Last page of docket

SHORT PROCEEDINGS AND ORDERS DATE: (06/28/91)

CASE NBR: (90107829) CSY STATUS: (DECIDED)

SHORT TITLE: (Feltrop, Ralph C.)

VERSUS (Missouri) DATE DOCKETED: (050391)

*** CAPITAL CASE -- Stay granted by lower court *** PAGE: (01)

	DATE	NOTE	PROCEEDINGS & ORDERS
1	May 3 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 29 1991		Brief of respondent Missouri in opposition filed.
4	Jun 5 1991		DISTRIBUTED. June 20, 1991
6	Jun 24 1991		REDISTRIBUTED. June 27, 1991
8	Jun 28 1991		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.)

****

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-7033

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

RALPH CECIL FELTROP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. _____
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COME NOW, Nancy A. McKerrow, Attorney for Petitioner, and Ralph Cecil Feltrop, Petitioner, who is incarcerated in the Potosi Correctional Center, Missouri Department of Corrections, to ask leave to file the attached Petition for Writ of Certiorari in the Supreme Court of the United States without prepayment of costs and to proceed in forma pauperis. Leave was granted allowing Petitioner to proceed in forma pauperis in the Circuit Court of Jefferson County and the Supreme Court of the State of Missouri. The Petitioner's affidavit in support of this Petition is attached hereto.

Respectfully submitted

Nancy A. McKerrow

Nancy A. McKerrow
Attorney for Petitioner
3402 Buttonwood
Columbia, Missouri 65201-3722
(324) 442-1101

Janet M. Thompson
Of Counsel

9

64 pp

90-7933

CERTIFICATE OF SERVICE

I, Nancy A. McKerrow, hereby certify that on this 1st day of May, 1991, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Nancy A McKerrow
Nancy A. McKerrow

IN THE
SUPREME COURT OF THE UNITED STATES

RALPH CECIL FELTROP,	)	
	)	
Appellant,	)	
	)	
vs.	)	No.
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ralph Cecil Feltrop, being first duly sworn according to law, depose and state that I am the Petitioner in this cause. Moreover, in support of my application for leave to proceed in forma pauperis pursuant to Rule 46, without being required to prepay costs or fees, I state:

1. I have been incarcerated since March 24, 1987;

2. I am not employed and have not been employed since my incarceration in Jefferson County Jail. I was last employed in Ballwin, Missouri, as a technician in Koepke Television. My wage was $6.50 per hour;

3. I receive no income from any business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources;

4. I do not own any cash, nor do I have any checking or savings accounts;

5. I do not own any real estate, stocks, bonds, notes, or other valuable property;

6. There are no persons at present who are dependent on me for my support;

7. Because of my poverty, I am unable to pay the cost of this case;

8. I am unable to give security for this case;

9. I believe that I am entitled to the redress I ask in this case;

10. The nature of the case is briefly stated as follows:

I was found guilty of one count of first degree murder and was sentenced to death on that count. My petition filed herewith seeks a review of that judgment. The judgment of the jury trial court's sentence was affirmed on direct appeal on January 9, 1991, by the Missouri Supreme Court. That Court denied a duly-filed request for rehearing on February 7, 1991. The constitutionality of the death sentence as applied in this case and the constitutionality of my judgment and sentence were argued before the Missouri Supreme Court; and

11. Unless I am permitted to proceed with my Petition for Writ of Certiorari in forma pauperis, I will be subject to execution under the mandate of the Missouri Supreme Court without having had the opportunity to present substantial constitutional questions to this Court.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Ralph C. Feltrop
Ralph Cecil Feltrop

Subscribed and sworn to before me, a Notary Public, this 18th day of April, 1991.

Notary Public

My Commission Expires: STATE OF MISSOURI
MY COMMISSION EXPIRES JULY 15, 1994
ST. FRANCOIS COUNTY

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

RALPH CECIL FELTROP,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSOURI

NANCY A. MCKERROW
OFFICE OF STATE PUBLIC DEFENDER
3402 Buttonwood
Columbia, Missouri 65201-3722
(314) 442-1101

Counsel for Petitioner

JANET M. THOMPSON
Of Counsel

QUESTION PRESENTED

1. Whether Missouri's "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman" aggravating circumstance, interpreted by the Missouri Supreme Court to be too vague to provide adequate guidance to a sentencer, as applied to Petitioner, failed to channel the sentencer's discretion as required by the Eighth Amendment when that was the sole aggravating circumstance found by the jury and no constitutional limiting construction was given to the jury?

LIST OF PARTIES

The Petitioner, Ralph Cecil Feltrop, appears through Nancy A. McKerrow, Office of State Public Defender, 3402 Buttonwood, Columbia, Missouri 65201-3722.

Respondent, State of Missouri, appears by The Honorable William L. Webster, Attorney General of Missouri, P.O. Box 899, Jefferson City, Missouri 65102.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

No. _____

RALPH CECIL FELTROP,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Ralph Cecil Feltrop, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Missouri in the case styled State of Missouri v. Ralph Cecil Feltrop, No. 70896, 803 S.W.2d 1 (Mo. banc 1991).

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri in the case styled State of Missouri v. Ralph Cecil Feltrop, No. 70896, 803 S.W.2d 1 (Mo. banc 1991), the case for which certiorari is being sought, was filed on January 9, 1991, and may

be found in the Appendix at pages 1-23. Janet M. Thompson, of counsel for Petitioner, timely filed a Motion for Rehearing (App. 24-31), which was denied on February 7, 1991 (App. 32). On February 7, 1991, the Missouri Supreme Court set Petitioner's execution date for May 15, 1991 (App. 32-33).

JURISDICTION

On January 9, 1991, an opinion rendered by the Supreme Court of Missouri affirmed Petitioner's judgment and conviction for first degree murder and his sentence of death (App. 1-23). Janet M. Thompson, of counsel for Petitioner, timely filed a Motion for Rehearing (App. 24-31), which was denied on February 7, 1991 (App. 32). On February 7, 1991, the Missouri Supreme Court set Petitioner's execution date for May 15, 1991 (App. 32-33). The jurisdiction of this Court is invoked under 28 USC Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the follcwing provisions of the Constitution of the United States:

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

This case also involves the following provisions of the statutes of the State of Missouri, which are set forth in the Appendix: Mo. Rev. Stat. Sections 565.020, 565.030, 565.032 and 565.040 (1986). This case invokes Missouri Supreme Court Rule 29.05, which is set forth in the Appendix. This case also involves the following provisions of the statutes of the State of Arizona, which are set forth in the Appendix: Ariz. Rev. Stat. Sections 13-703(B), (C), (F), (G).

STATEMENT OF THE CASE

1. The Case: Petitioner was convicted by a jury of murder in the first degree, pursuant to Mo. Rev. Stat. Section 565.020 (1986). Immediately after the guilty verdict was rendered, a sentencing hearing was held pursuant to Mo. Rev. Stat. Sections 565.030 and 565.032 (1986). Both sides presented additional evidence at that hearing. The jury then returned its verdict of death, finding the existence of one statutory aggravating circumstance. On August 3, 1988, the trial court sentenced Petitioner to death in accordance with the jury's verdict.

The Missouri Supreme Court affirmed Petitioner's conviction and sentence. On February 7, 1991, Petitioner's motion for rehearing was overruled and his execution was set for May 15, 1991. Petitioner now files this Petition for Writ of Certiorari.

2. The Facts: The evidence introduced at trial showed the following:

On March 16, 1987, David J. Cross was driving down a country road in St. Charles County and saw a locker trunk sitting beside the road. He stopped and, upon opening the trunk, found within it a woman's torso. That same day, Petitioner went to the Jefferson County Sheriff's Department and made a missing person's report on his live-in girlfriend, Barbara Ann Roam. He told the officer that he and Roam had argued on March 8; she had left that afternoon; had returned briefly about 3:00 a.m. on March 9; had gathered some clothes, and had left in a light-colored station wagon with a man.

On March 23, 1987, Petitioner was brought to the police station for questioning. After several hours of questioning, Petitioner stated that, on March 8, as they ate dinner, Roam had accused him of seeing other women and they had argued. She threw a steak knife at Petitioner and then followed him from the dinner table, poking him with a knife. Later that night, Roam awakened Petitioner as she again tried to stab him with a knife. They struggled for the knife, and, in the course of the struggle, Roam was stabbed in the neck. She died from that sole stab wound. The evidence adduced at trial indicated that Petitioner later cut up the body, placing part in the trunk and the rest in plastic bags. Petitioner thereafter took the officers to a farm pond where they found large plastic bags containing the rest of Roam's body.

At trial, the medical examiner testified that the fatal wound was on the right side of the neck, severing the vertebral artery and partially severing the spinal cord. She further stated that the neck wound was the sole pre-mortem wound and that all of the dismemberment occurred post-mortem. She testified that Roam could have gone into shock within ten minutes of receiving the wound and that she had died from 15-20 minutes to four hours of being wounded. The jury found Petitioner guilty of first degree murder. The second phase of trial then began, at which both sides adduced evidence. Over objection, the trial court submitted the following penalty phase instruction to the jury:

> In determining the punishment to be assessed against the defendant for the murder of Barbara Ann Roam, you must first unanimously determine whether the following aggravating circumstance exists:
>
> Whether the murder of Barbara Ann Roam involved torture and or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

No further definitions of the terms or phrases used in the instruction were provided to the jury.

When the jury returned its verdict assessing Petitioner's punishment at death, it found that:

> The murder of Barbara Ann Roam involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

The jury did not make a finding of torture. The trial court thereafter sentenced Petitioner to death, in accordance with the jury's determination. It denied a motion by Petitioner to reduce the sentence.

REASONS TO GRANT THE WRIT

I.

MISSOURI'S "DEPRAVITY OF MIND" AGGRAVATING CIRCUMSTANCE, AS APPLIED TO PETITIONER, FAILED TO CHANNEL THE SENTENCER'S DISCRETION AS REQUIRED BY THE EIGHTH AMENDMENT. THIS WAS THE SOLE AGGRAVATING CIRCUMSTANCE FOUND BY THE JURY, NO CONSTITUTIONAL LIMITING CONSTRUCTION WAS GIVEN TO THE JURY AND THE MISSOURI SUPREME COURT HAS HELD THAT THIS AGGRAVATING CIRCUMSTANCE, WITHOUT FURTHER DEFINITION, IS TOO VAGUE TO PROVIDE ADEQUATE GUIDANCE TO A SENTENCER.

On November 6, 1987, the State of Missouri notified Petitioner that it intended to seek the death penalty. It stated that it would rely only on the statutory aggravating circumstance "that the murder of Barbara Ann Roam was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind."

Prior to trial, on June 16, 1988, Petitioner filed a Motion to Declare Statute Unconstitutional, in which he alleged that Mo. Rev. Stat. Section 565.032.2(7) (1986) was unduly vague, in violation of the Eighth and Fourteenth Amendments, as it failed to adequately inform the jury of what must be found to impose death and it left the jury with unchanneled discretion.

In the penalty phase of trial, the Court submitted Instruction 4B to the jury. That instruction, based on Mo. Rev. Stat. Section 565.032.2(7) (1986), and submitting the sole aggravating circumstance in the case, stated:

> In determining the punishment to be assessed against the defendant for the murder of Barbara Ann Roam, you must first unanimously determine whether the following aggravating circumstance exists:
>
> > Whether the murder of Barbara Ann Roam involved torture and or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

None of the terms or phrases used in the instruction were further defined for the jury.

The jury returned a verdict assessing Petitioner's sentence at death and found, as the sole aggravating circumstance, that:

> The murder of Barbara Ann Roam involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

In Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), this Court held that one of the two statutory aggravating circumstances found by the jury, that the murder was "especially heinous, atrocious, or cruel," 108 S.Ct. at 1856, was unconstitutionally vague because it provided no guidance to the exercise of the jury's discretion in its capital sentencing decision. 108 S.Ct. at 1858-59. This Court noted in Maynard that, since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), this Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S.Ct. at 1858, citing Gregg v. Georgia, 428 U.S. 153, 189, 206-07, 96 S.Ct. 2909, 2940-41, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at

220-222, 96 S.Ct., at 2947-48 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462, 104 S.Ct. 3154, 3163, 82 L.Ed.2d 340 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___, 108 S.Ct. 546, ___, 98 L.Ed.2d 568 (1988). It is the suitably-directed discretion of the sentencer that protects against arbitrary and capricious capital sentencing. Maynard, 108 S.Ct. at 1858.

Post-Furman, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), this Court held that the statutory aggravating circumstance found by the jury, that the murder was "outrageously or wantonly vile, horrible or inhuman," was unconstitutionally vague since nothing in those words, standing alone, placed any inherent restraint on the arbitrary and capricious imposition of the death penalty. 446 U.S. at 428; 100 S.Ct. at 1764. Further, this Court held that the Georgia Supreme Court's affirmance of the death sentence failed to cure the problem of unfettered discretion since it did not apply the previously-enunciated limiting construction of the aggravating circumstance. 446 U.S. at 429, 432, 100 S.Ct. at 1765, 1766-67. Therefore, this Court concluded, no principled way existed to distinguish that case from other cases in which death was not imposed. 446 U.S. at 433, 100 S.Ct. at 1767.

Consonant with the principles expressed by this Court in Maynard, Gregg, Furman, and Godfrey, in this case the Missouri Supreme Court stated, "This Court first acknowledges that the language 'depravity of mind . . . outrageously or wantonly vile, horrible or inhuman,' without further definition, is too vague to

provide adequate guidance to a sentencer." State v. Feltrop, 803 S.W.2d 1, 14 (Mo. banc 1991). The Missouri Supreme Court went on to note that it had articulated a limiting construction of the circumstance in State v. Preston,[1] 673 S.W.2d 1, 11 (Mo. banc), cert. denied, 469 U.S. 893 (1984). Feltrop, 803 S.W.2d at 14. The Court recognized that "[t]he problem in this case rests upon the fact that the limiting definition was not given to the jury." Id. at 15. It then stated that, but for this Court's opinion in Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), Petitioner's death sentence would have to be vacated. Feltrop, 803 S.W.2d at 15.

The Missouri Supreme Court's principal opinion held that, within the meaning of Walton, the trial judge acted as the "final sentencer" since, although the jury had rendered the death sentence, Petitioner had sought relief under Missouri Supreme Court Rule 29.05 that gave the trial court the power to reduce sentence if it found the punishment excessive. Id., at 15-16. The Missouri Supreme Court's principal opinion went on to hold that, based on Walton:

> [t]his Court presumes that the trial judge knew and applied the relevant factors enunciated in State v. Preston when he evaluated and ruled on appellant's motion for reduction of sentence. Also on the authority of Walton, it is therefore irrelevant in this case that Section 565.032.2(7) and Instruction 4B did not narrow the construction of the language in question. This Court concludes that Section 565.032.2(7) and Instruction 4B, as construed by this Court and as presumed to have been applied by the trial court, furnished sufficient guidance to the final sentencer.

Id., at 16.

[1] A limiting construction itself can be constitutionally vague and insufficient. Shell v. Mississippi, ___ U.S. ___, 111 S.Ct. 313 (1990); Moore v. Clarke, 904 F.2d 1226 (8th Cir. 1990).

The Missouri Supreme Court's principal opinion misconstrues the effect of Walton v. Arizona. In Walton, this Court rejected the Petitioner's claim that the especially heinous, cruel or depraved aggravating circumstance, as interpreted by the Arizona courts, failed adequately to channel the sentencer's discretion and under Maynard and Godfrey should be held invalid. Walton, 110 S.Ct. at 3056-57. This Court noted, in so holding, that Maynard and Godfrey were distinguishable in that first, in both of those cases, the defendant had been jury sentenced and the jury had been instructed only in the vague words of the statute itself or in words equally as vague. Second, in neither Maynard nor Godfrey did the state appellate court purport to affirm the death sentence by applying a limiting construction of the aggravating circumstance. Walton, 110 S.Ct. at 3057. Both of the distinguishable features present in Maynard and Godfrey are present in this case. This Court went on to state that "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey." Walton, 110 S.Ct. at 3057 (emphasis added).

Crucial to this Court's decision in Walton is the underlying Arizona statute that governs sentencing. Ariz. Rev. Stat. Section 13-703(B) (1988) provides, in part, that:

> When a defendant is found guilty of or pleads guilty to first degree murder . . . the judge who presided at the trial or before whom the guilty plea was entered . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of the [aggravating and mitigating] circumstances . . . for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

Thus, under the Arizona procedures, the trial judge, not the jury, is the sentencer.

Contrary to the belief of the Missouri Supreme Court, the Arizona procedure is radically distinct from that used in Missouri. Mo. Rev. Stat. Section 565.030.2 provides, in part, that:

> Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage . . .

Mo. Rev. Stat. Section 565.030.4 further provides, in part, that:

> If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of trial shall proceed at which the only issue shall be the punishment to be assessed and declared.

Mo. Rev. Stat. Section 565.030.4 also provides that the trier shall assess and declare punishment at life imprisonment if (1) it does not find at least one of the statutory aggravating circumstances, or (2) it does not find that the aggravating circumstances warrant imposing the death penalty, or (3) it finds the mitigating circumstances outweigh the aggravating circumstances, or (4) it decides, under all the circumstances, not to impose death. If the trier assesses and declares the

punishment at death, it must list the aggravating circumstances that it finds. Mo. Rev. Stat. Section 565.030.4. Finally, if the trier is a jury, it is instructed, before the case is submitted, that if it cannot decide the issue of punishment, the trial judge must decide whether to assess and declare punishment at life imprisonment or death. Mo. Rev. Stat. Section 565.030.4.

If the trier of fact is a jury and not the court, Mo. Rev. Stat. Section 565.030.4 thus "commits the assessment of the death sentence, if appropriate aggravating circumstances are found, to the complete discretion of the jury." State v. Feltrop, 803 S.W.2d at 23 (Blackmar, C.J., and Holstein, J., dissenting in part). The trial judge cannot be described as the "final sentencer" under the Missouri procedure because, unless it is a court-tried case, the trial judge can only impose a death sentence if either the jury authorizes the imposition of the death penalty or if the jury finds the existence of aggravating circumstances but then informs the trial judge that it cannot agree on punishment. Feltrop, 803 S.W.2d at 23 (Blackmar and Holstein, C.J., J., dissenting in part); Mo. Rev. Stat. Sections 565.030-.032. In a jury-tried capital case in Missouri, the trial judge is precluded from pronouncing a death sentence if the jury has specifically determined that a life sentence is appropriate or that no aggravating circumstances exist. That Missouri Supreme Court Rule 29.05 vests in the trial court the ability to reduce the punishment imposed by the jury is irrelevant in that, while it gives the power to reduce sentence, it does not give the power to increase it. Only in the

aforementioned narrow circumstances can the trial judge impose death. Thus, since the trial judge cannot be deemed the "final sentencer," this Court's decision in Walton is inapposite.

This Court has repeatedly recognized that the jury must be properly instructed to comport with the fundamental Eighth Amendment requirement that the death penalty not be imposed in an arbitrary or capricious manner. Maynard v. Cartwright; Godfrey v. Georgia; Walton v. Arizona, 110 S.Ct. at 3057. The courts of Missouri have also recognized that the right to a trial by jury necessarily includes the right to a properly instructed jury. See e.g. State v. Carter, 585 S.W.2d 215 (Mo. App., S.D. 1979); State v. Williams, 692 S.W.2d 307 (Mo. App., E.D. 1985); see also United States v. Thomas, 895 F.2d 1198 (8th Cir. 1990).

In this case, Petitioner's jury, the "final sentencer" under the Missouri procedure, was improperly instructed because, as admitted by the Missouri Supreme Court, the sole aggravating circumstance submitted to and found by the jury was unconstitutionally vague. Feltrop, 803 S.W.2d at 14. Under these circumstances, the instructional error could not be cured by the trial court's action in ruling Petitioner's motion to reduce sentence because "there is no assurance that the jury would have authorized a death sentence if it had been properly instructed in accordance with Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), and the limiting construction announced in State v. Preston, 673 S.W.2d 1, 11 (Mo. banc 1984)." State v. Feltrop, 803 S.W.2d at 22 (Blackmar and Holstein, JJ., dissenting in part).

Petitioner submits that the "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman" aggravating circumstance as applied to Petitioner failed to channel the sentencer's discretion as required by the Eighth Amendment. That was the sole aggravating circumstance found by the jury, yet no constitutional limiting construction was given to the jury. For these reasons, this Court should grant Petitioner's Writ of Certiorari, vacate his sentence, and remand for resentencing to life imprisonment without probation or parole.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted,

Nancy A. McKerrow, MOBar #32212
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(314) 442-1101

CERTIFICATE OF SERVICE

I, Nancy A. McKerrow, hereby certify that on this 1st day of May, 1991, a true and correct copy of the foregoing was mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Nancy A. McKerrow

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

RALPH CECIL FELTROP,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MISSOURI

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Counsel for Petitioner

Janet M. Thompson
Of Counsel

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ARIZONA REVISED STATUTE 13-704. 36-37

STATE of Missouri, Respondent,

v.

Ralph Cecil FELTROP, Appellant.

Ralph Cecil FELTROP, Appellant,

v.

STATE of Missouri, Respondent.

No. 70896.

Supreme Court of Missouri,
En Banc.

Jan. 9, 1991.

As Modified on Denial of Rehearing
Feb. 7, 1991.

Defendant appealed his conviction for murder and denial of postconviction relief by the Circuit Court, Jefferson County, Philip G. Hess and John L. Anderson, JJ. The Supreme Court, Covington, J., held that: (1) evidence sustained finding of deliberation; (2) evidence sustained finding of depravity; (3) failure to give instruction limiting "depravity of mind" did not require reversal of death sentence; (4) death sentence was not disproportionate; and (5) defendant received effective assistance of counsel.

Affirmed.

Blackmar, C.J., filed an opinion concurring in part and dissenting in part in which Holstein, J., joined.

1. Criminal Law ⇐121, 1150

Whether to grant or deny change of venue rests within the trial court's discretion and its ruling will not be disturbed absent abuse of discretion; abuse exists only when the record shows that inhabitants of the county are so prejudiced against defendant that a fair trial cannot occur there.

2. Criminal Law ⇐126(2)

Defendant did not show entitlement to change of venue of his murder trial; most of the media coverage occurred more than a year prior to trial and the most recent exhibit offered by defendant was published eight months prior to trial, and 68 of the 102 venirepersons indicated that they had some knowledge of case but all eight of the fourteen venirepersons finally empaneled who said they had been exposed to some degree of pretrial publicity stated that they could try the case in a fair and impartial manner.

3. Criminal Law ⇐1152(2)
Jury ⇐85

Trial court possesses broad discretion in determining qualifications of prospective jurors, and its ruling on challenge for cause will not be disturbed unless it constitutes clear abuse of discretion and a real probability of injury.

4. Criminal Law ⇐1166.18
Jury ⇐137(1)

Accused is entitled to a full panel of qualified jurors before he is required to expend peremptory challenges, and failure of trial court to grant a legitimate challenge for cause is reversible error.

5. Jury ⇐103(14), 107

Venireperson who initially indicated that she might have difficulty affording defendant the presumption of innocence, venireperson who had learned of the case from a person who had worked at the same place as the decedent, and venireperson who felt that there was a reason why defendant was arrested were properly permitted to serve, where they stated unequivocally that they could follow the court's instructions and act with fairness and impartiality.

6. Jury ⇐100

Venirepersons are not automatically excluded for cause because they may have formed an opinion based on publicity; initial reservations expressed by venirepersons do not determine their qualification, and consideration of the entire voir dire examination of the venireperson is determinative.

7. Jury ⇐103(6)

Question is not whether prospective juror holds opinions about the case but whether those opinions will yield and the

juror will determine the issues under the law.

8. Criminal Law ⇐769, 1173.1

Failure to give a proper instruction is error, the prejudicial effect of which, if any, is to be judicially determined; to determine prejudice, court considers facts and instructions together. V.A.M.R. 28.02(f).

9. Criminal Law ⇐1174(1)

Defendant was not prejudiced by court's failure to instruct the jurors prior to their first recess not to discuss the case or expose themselves to publicity about the case where the court did give the instruction before other recesses, the first recess lasted approximately 30 minutes, and counsel conducted a voir dire of the jurors to determine which ones had been exposed to publicity and whether their exposure would prevent them from being fair and impartial.

10. Criminal Law ⇐868

To the extent that defendant failed to question venirepersons concerning any exposure to publicity about the trial during their first recess, prior to which they had not been instructed not to discuss the case or to expose themselves to publicity, he waived any claim of error.

11. Criminal Law ⇐798

Instruction requiring jurors to fix punishment at life imprisonment if they unanimously find that one or more mitigating circumstances exists sufficient to outweigh the aggravating circumstances which they have found to exist is constitutionally valid, despite claim that it could prevent the jurors from considering all mitigating evidence.

12. Criminal Law ⇐867

Declaration of mistrial is a drastic remedy to be exercised only in extraordinary circumstances.

13. Criminal Law ⇐1155

Trial court has the opportunity to observe incident giving rise to request for mistrial and is in a better position than an appellate court to evaluate its prejudicial effect, so that review extends only to determine whether, as a matter of law, trial court abused its discretion in refusing to declare a mistrial.

14. Criminal Law ⇐713

Prosecutor's objection to question asked by defense counsel during voir dire for death qualification in which prosecutor stated that defense counsel's question as to whether anyone felt that life without parole did not really mean life without parole went to what would happen in the future and that "It's a discretionary decision for people in the future" did not impermissibly minimize jury's sense of responsibility for determining the appropriateness of the death penalty.

15. Witnesses ⇐40(1), 45(2)

For child under the age of ten to be judged competent to testify, the child must exhibit a present understanding of, or the ability to understand upon instruction, the obligation to speak the truth, must exhibit capacity to observe the occurrence about which testimony is being sought, must exhibit the capacity to remember the occurrence about which testimony is sought, and must exhibit the capacity to translate that occurrence into words. V.A.M.S. § 491.060.

16. Criminal Law ⇐1153(2)
Witnesses ⇐79(1)

Determination of competency of witness is left to the discretion of the trial court and its discretion will not be reversed absent clear abuse of discretion.

17. Witnesses ⇐37(3), 45(2), 77

Trial court properly precluded victim's six-year-old daughter from testifying in view of her testimony indicating that she did not remember the day on which her mother was killed, her failure to exhibit any understanding of the obligation to tell the truth, and her uncooperative and unresponsive conduct during the hearing into her competency.

18. Witnesses ⇐78

Testimony of six-year-old child's aunt that child could carry on a conversation was not relevant to the child's competency

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19. Criminal Law ⇐
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23. Homicide ⇐147
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19. Criminal Law ⇐438(7)

Photographs may be admitted, even though gruesome, where they show the nature and location of the wounds, enable the jury to better understand the testimony, aid in establishing any elements of the State's case, or depict the conditional location of the body.

20. Criminal Law ⇐438(7)

Photographs of victim's mutilated body was admissible to show condition and location of the body as well as the condition and location of the wounds, despite defendant's claim that their prejudicial effect outweighed their probative value.

21. Criminal Law ⇐783(3), 823(1)

Failure to cross reference verdict director to self-defense instruction is error which is not cured by giving a separate self-defense instruction.

22. Criminal Law ⇐823(1)

Defendant was not entitled to reversal because of trial court's verdict director which did not contain cross reference to self-defense instruction where the court withdrew the initial verdict director only minutes after the jury retired to deliberate and replaced the erroneous verdict director with the correct instruction.

23. Homicide ⇐147

Deliberation may be inferred from the circumstances surrounding a murder. V.A.M.S. § 565.002(3).

24. Homicide ⇐232

Finding of deliberation was supported by evidence that victim had been begging her prior boyfriend to take her back because she was afraid that something bad was going to happen to her, that defendant had caused bruises on victim, that the fatal blow was the second, not the first, attempt to stab the victim, that defendant planned to conceal evidence and to cast suspicion upon the victim's former boyfriend, that the victim lived for a period of 15 minutes to four hours while she bled to death, and that she was conscious for at least part of that time, during which defendant could have sought assistance but did not. V.A.M.S. § 565.002(3).

25. Criminal Law ⇐1158(4)

When reviewing trial court's ruling on motion to suppress, inquiry is limited to whether the court's decision is supported by substantial evidence, and deference is given to the trial court's superior opportunity to determine the credibility of witnesses.

26. Criminal Law ⇐531(3)

Finding that defendant's confession was not coerced and was voluntary was supported by evidence that officers engaged in no coercive conduct and made no promise or threats, that defendant was given drinks and opportunity to use the restroom and to take breaks, that defendant was given time to calm himself when he became upset, and that defendant was advised of his *Miranda* rights and voluntarily waived them.

27. Constitutional Law ⇐266.1(1)

Coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the due process clause. U.S.C.A. Const.Amend. 14.

28. Criminal Law ⇐518(2)

Questioning of defendant prior to his confession was not custodial interrogation requiring *Miranda* warnings where defendant voluntarily followed officer to police station and was, at all times prior to his incriminating statement, free to depart.

29. Criminal Law ⇐412.2(2)

Even if defendant was a suspect in the minds of the officers, there was no custodial interrogation where defendant was not under arrest or otherwise restrained of his liberty during questioning.

30. Criminal Law ⇐721(3)

Prosecutor's closing argument during penalty phase that defendant was unable to refute testimony that victim lived for a minimum of 15 minutes after the fatal wound and that she was conscious was not an impermissible reference to defendant's failure to testify.

31. Criminal Law ⇐721(6)

Prosecutor may not comment on defendant's failure to testify, but prosecutor may make reference to defendant's failure to offer evidence.

32. Criminal Law ⇐800(1)

When MAI notes on use do not provide for definition, court must not give one.

33. Criminal Law ⇐1173.2(1)

Failure to define words of common usage which would not confuse the jury does not constitute prejudice.

34. Homicide ⇐311

Language in punishment instruction referring to the homicide involving "depravity of mind" and "outrageously or wantonly vile, horrible or inhuman" without further definition, is too vague to provide adequate guidance to a sentencer.

35. Homicide ⇐311, 357(11)

Factors to be considered in determining whether depravity of mind exists include mental state of defendant, infliction of physical or psychological torture on the victim, brutality of defendant's conduct, mutilation of the body after death, absence of subtantive motive, absence of remorse, and nature of the crime; proper limiting instruction requires that at least one of those factors be present before court will find evidence supports a finding of depravity of mind.

36. Homicide ⇐341

Fact that jurors were not given a limiting instruction with respect to depravity of mind as a basis for imposing the death penalty did not require that sentence be vacated where it was presumed that the trial judge knew and applied the relevant factors when he evaluated and ruled on murder defendant's motion for reduction of sentence. V.A.M.S. § 565.032, subd. 2(7).

37. Homicide ⇐358(1)

Finding that murder of victim involved depravity of mind and was thus outrageously or wantonly vile, horrible, or inhuman was supported by evidence that victim bled to death over period of 15 minutes to four hours, that defendant developed and carried out a plan to conceal [illegible] volvement in the crime, and that [illegible] carved the victim's body to conceal [illegible] render it difficult to identify [illegible] body parts in separate locations, [illegible] § 565.032, subd. 2(7).

38. Homicide ⇐356

Sentence of death imposed [illegible] dant who stabbed victim to death [illegible] not seek aid for her during the 15 [illegible] to four hours that she bled to [illegible] who then mutilated the body [illegible] proportionate. V.A.M.S. § 565.[illegible] 3(3).

39. Criminal Law ⇐1038(1)

Plain error exists only when [illegible] finds that a manifest injustice or [illegible] riage of justice has occurred.

40. Criminal Law ⇐721(3)

Closing argument at the guilt [illegible] which the prosecutor asked the jury [illegible] one could disprove self-defense and [illegible] ed them that there were only two [illegible] present when the crime was occur[illegible] that one of them was dead and [illegible] speak for herself was improper [illegible] on defendant's failure to testify.

41. Criminal Law ⇐1137(8)

Prosecutor's closing argument at [illegible] phase which reminded the jurors that [illegible] were only two persons present when [illegible] victim was killed and that one of the [illegible] dead and could not speak for her[illegible] not require reversal where [illegible] moved for mistrial and court was [illegible] to grant the mistrial but defendant [illegible] withdrew the motion.

42. Criminal Law ⇐706(3)

Cross-examination of penalty [illegible] witness, a teacher who testified [illegible] way other students had picked on [illegible] dant and teased him when he was [illegible] did not amount to an argument that [illegible] dant's personal background and [illegible] constituted an aggravating factor [illegible] examination of teacher as to whether [illegible] ever had a conversation with [illegible] about his behavior patterns was [illegible] to demonstrate that the defendant's [illegible] ior as a student was not unusual [illegible]

for the teacher to feel compelled to speak to him about it.

43. Criminal Law ⇐713, 719(3)

Prosecutor's closing argument at penalty phase that the case was a "proper case" for the death penalty did not mislead the jurors as to their responsibility for determining the sentence and did not inject the prosecutor's own opinions or imply additional knowledge.

44. Criminal Law ⇐998(8)

Postconviction proceeding is not to be used to challenge effectiveness of counsel in the postconviction proceeding.

45. Criminal Law ⇐641.13(1), 1166.11(5)

To show that counsel's assistance was so defective as to require reversal of conviction or death sentence, defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant; to show prejudice, defendant must show a reasonable probability that, but for counsel's unprofessional errors, result of the proceeding would have been different.

46. Criminal Law ⇐641.13(1)

Counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment.

47. Criminal Law ⇐641.13(2)

Counsel's failure to move for mistrial when prosecutor made closing argument at guilt phase which commented on the defendant's failure to testify was not ineffective assistance in view of counsel's belief that the State had made mistakes in the presentation of its case which would not be repeated on retrial and counsel's belief that there would certainly be a retrial because the State would not dismiss the charges and defendant would not plead guilty to reduced charges.

48. Criminal Law ⇐641.13(2, 7)

Counsel was not ineffective for failing to allow defendant to testify at either the guilt or penalty phase in view of counsel's belief that defendant was "playing games with me" as to whether he wanted to testify and in view of counsel's belief that defendant would deny having committed the crime and would thus likely diminish his credibility.

49. Criminal Law ⇐641.13(6, 7)

Defense counsel adequately investigated psychiatric evidence to support defense premised on battered spouse syndrome, and to demonstrate mitigating circumstances, and his choice not to present expert testimony was based on reasonable trial strategy based on concern that cross-examination would elicit statements which defendant had made to the expert and which were inconsistent with claim of self-defense.

Janet M. Thompson, Columbia, for appellant.

William L. Webster, Atty. Gen., Breck K. Burgess, Asst. Atty. Gen., Jefferson City, for respondent.

COVINGTON, Judge.

Appellant Ralph Cecil Feltrop appeals his conviction by jury of murder in the first degree, § 565.020, RSMo 1986, for which Feltrop was sentenced to death, and he appeals from the denial of his postconviction relief motion., Affirmed.

Viewed in the light most favorable to the verdict, *State v. Guinan*, 665 S.W.2d 325, 327 (Mo. banc), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984), the facts are as follows: On or about March 9, 1987, Barbara Roam, appellant's live-in girlfriend, died from an incised wound to the right side of her neck which severed her vertebral artery, causing her to bleed to death. Appellant inflicted the wound by one forceful thrust from a sharp instrument that not only severed the vertebral artery but also penetrated the cervical spine, causing paralysis of Roam's right side. Appellant subsequently cut and hacked at Roam's body until he succeeded in severing her head, hands, and lower legs from her torso. He also severed one foot from the leg and aborted an attempt to sever her upper legs in the groin area. Appellant then stuffed the torso into a

trunk and dumped the trunk near Duke Road in St. Charles County. He placed the remainder of the body parts into garbage bags and threw them into a pond near Highway MM between Highway 21 and Highway 30 in Jefferson County. The body was preserved by refrigeration for at least one week. Whether the mutilation of Barbara Roam's body occurred prior to or after refrigeration was not established. Appellant's defense at trial was self-defense.

In the penalty phase, the state offered the evidence from the guilt phase. Appellant presented testimony of six witnesses who testified regarding appellant's background and character. The jury recommended the death penalty, finding as a statutory aggravating circumstance that the murder of Barbara Roam was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind. § 565.032.2(7), RSMo 1986. The trial court sentenced Feltrop to death.

Other facts relevant to the direct appeal are developed as required throughout the opinion.

DIRECT APPEAL

Preserved Error

Appellant contends that the trial court erred in denying his motions for change of venue and to strike for cause the entire venire. Appellant alleged that extensive pretrial publicity and the "spectacular nature of the offense charged" created a substantial likelihood that he would be denied a trial by a fair and impartial jury.

[1] Whether to grant or deny a change of venue rests within the trial court's discretion, and its ruling will not be disturbed absent abuse of discretion. *State v. Schneider*, 736 S.W.2d 392, 402 (Mo. banc 1987), *cert. denied*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988). Likewise, the trial court's ruling on challenges for cause will be rejected only if there is a clear showing of abuse of discretion and a real probability of injury to the complaining party. *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989), *cert. denied*, — U.S. —, 110 S.Ct. 744, 107 L.Ed.2d 762 (1990). An abuse of discretion exists only when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *State v. Leisure*, 749 S.W.2d 366, 376 (Mo. banc 1988). The relevant question is not whether or to what extent the community remembers the case, "but whether the jurors of ... [Feltrop's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 2890, 81 L.Ed.2d 847 (1984). The trial court is in a better position than the appellate court to assess the effect of publicity on the minds of the community and to determine whether the residents of the county are so prejudiced against a defendant that a fair trial would not be possible. *State v. Molasky*, 655 S.W.2d 663, 666 (Mo. App.1983), *cert. denied*, 464 U.S. 1049, 104 S.Ct. 727, 79 L.Ed.2d 187 (1984).

In *Patton*, all but two of the one hundred sixty-three venirepersons questioned about the case had heard of it, and one hundred twenty-six admitted that they would carry an opinion into the jury box. 467 U.S. at 1029, 104 S.Ct. at 2888. "[W]hile it is true that a number of jurors and veniremen testified that at one time they held opinions, for many, time had weakened or eliminated any conviction they had had." *Id.* at 1033, 104 S.Ct. at 2889. Those veniremen who retained their fixed opinions were removed from the venire. *Id.* at 1034, 104 S.Ct. at 2890. The United States Supreme Court found that the pretrial publicity did not make a fair trial impossible in the county in which the crime occurred. *Id.* at 1040, 104 S.Ct. at 2893.

[2] In support of his motions, appellant submitted numerous newspaper articles, transcripts from television and radio stations, video tapes of newscasts, and an article from Detective Cases magazine. The bulk of the media coverage occurred more than a year prior to trial; the most recent exhibit was published eight months prior to trial. Of the one hundred two venirepersons questioned, sixty-eight indicated that they had some knowledge of the

case; of these the trial court struck eight. Of the fourteen venirepersons finally impaneled, eight had been exposed to some degree of pretrial publicity. All eight were asked specifically whether they could judge the case in a fair and impartial manner, and all eight indicated that they could.

The evidence presented at the hearing on appellant's motion for a change of venue did not show that the inhabitants of Jefferson County were so prejudiced against appellant that a fair trial could not occur. The trial court did not abuse its discretion by denying appellant's motion for a change of venue and his motion to strike the entire venire.

Appellant contends that the court erred in overruling his challenges for cause to venirepersons Courtois, Nalls and Harpole, thereby denying him the right to a full panel of qualified jurors before he was required to exercise his peremptory challenges.

[3] The trial court possesses broad discretion in determining the qualifications of prospective jurors, and its ruling on a challenge for cause will not be disturbed on appeal unless it constitutes a clear abuse of discretion and a real probability of injury to the complaining party. *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989), *cert. denied*, — U.S. —, 110 S.Ct. 744, 107 L.Ed.2d 762 (1990).

[4] An accused is entitled to a full panel of qualified jurors before he is required to expend peremptory challenges, and failure of the trial court to grant a legitimate challenge for cause is reversible error. *Id.* The critical question is whether the challenged venirepersons unequivocally indicated their ability to evaluate the evidence fairly and impartially. *State v. Lingar*, 726 S.W.2d 728, 734 (Mo. banc 1987), *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1988). The trial court did not conduct an independent examination of these venirepersons, thus a more searching review by appellate courts is justified. *Id.*

[5] Venireperson Courtois initially indicated that she might have difficulty affording defendant the presumption of innocence. Upon questioning, however, she stated unequivocally that she could follow the court's instructions and could act with fairness and impartiality.

Venireperson Nalls learned of the case from a woman who worked at Lucille's Restaurant, where Barbara Roam worked prior to her death. Ms. Nalls initially expressed uncertainty as to whether she could put that information aside. Upon questioning, however, Ms. Nalls stated that she had no reason to value the opinion of the woman from Lucille's Restaurant, and further stated unequivocally that she could set aside anything she might have heard or seen and base her decision solely upon what she heard at trial.

Venireperson Harpole read newspaper articles about the case and indicated that he felt there was a reason the defendant was arrested. His ability to follow the law and instructions of the court and to be fair is reflected as follows:

> Q. At that time did you form any opinions or conclusions as to the guilt or innocence of any persons in connection with that?
>
> A. No, I did not.
>
> Q. Do you feel that you can put aside what you saw or heard in the news and base your decision, if chosen as a juror, solely on the evidence to be presented here in the courtroom and on the instructions to be given by Judge Hess?
>
> A. Yes, I do.
>
> Q. Do you feel that you can be fair and impartial to both the defendant and the state?
>
> A. Yes.
>
> Q. Can you promise this court that you can put aside any preconception that you might have and, if chosen as a juror, make your decision based solely on the evidence presented in this court and the instructions given by the Judge?
>
> A. Yes, I could.
>
> Q. Do you think that you can be fair and impartial to the defendant as well as to the state?
>
> A. Yes, I believe I could.

[6, 7] Venirepersons are not automatically excluded for cause because they may have formed an opinion based on publicity. *State v. Walls*, 744 S.W.2d 791, 795 (Mo. banc), *cert. denied*, 488 U.S. 871, 109 S.Ct. 181, 102 L.Ed.2d 150 (1988). Initial reservations expressed by venirepersons do not determine their qualifications; consideration of the entire *voir dire* examination of the venireperson is determinative. *State v. Johnson*, 722 S.W.2d 62, 65 (Mo. banc 1986). The question is not whether a prospective juror holds opinions about the case, but whether these opinions will yield and the juror will determine the issues under the law. *State v. Griffin*, 756 S.W.2d 475, 481 (Mo. banc 1988), *cert. denied*, 490 U.S. 1113, 109 S.Ct. 3175, 104 L.Ed.2d 1036 (1989).

Venirepersons Courtois, Nalls and Harpole demonstrated an ability to be fair and to follow the law and instructions of the court. The trial court did not abuse its discretion in overruling appellant's challenges for cause.

Appellant next asserts that the trial court erred in failing to read MAI–CR 3d 300.04 prior to the first recess. MAI–CR 3d 300.04 requires the court to instruct the jury prior to the first recess or adjournment not to discuss the case or to expose themselves to publicity about the case, and to remind the jury of these instructions prior to every subsequent recess or adjournment.

[8] Failure to give a proper instruction is error, the prejudicial effect of which, if any, is to be judicially determined. *Rule* 28.02(f). To determine prejudice, the court considers the facts and instructions together. *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988).

[9, 10] *Voir dire* examination prior to the first recess lasted approximately thirty minutes. The prosecutor questioned the venirepersons regarding whether any had heard of the case and whether any would suffer a hardship as a result of serving on a sequestered panel. Immediately after the panel returned from lunch, appellant informed the court of the omission and requested a mistrial. The court responded that counsel would be given opportunity to question the venirepersons regarding what discussions or exposures to publicity they might have experienced during the lunch hour. Counsel conducted *voir dire* in the normal course. A juror-by-juror examination during the entirety of *voir dire* revealed which jurors who had been exposed to publicity could be fair and impartial. Conduct of *voir dire* also revealed that one venireperson, Mary Green, had been exposed to a newspaper article about the case during the luncheon recess. She glanced at it as she used a telephone. According to Ms. Green, nothing about the article caused her to be unfair. The court read MAI–CR 3d 300.04 to the venire before it took its second recess and before each subsequent recess and adjournment. In view of the limited amount of *voir dire* conducted prior to the first recess, the opportunity given to appellant to question the venire as to what publicity they had been exposed during the first recess, and the fact that the instruction was read before each subsequent recess and adjournment, appellant suffered no prejudice. Moreover, to the extent appellant failed to question venirepersons about this particular subject, having been given opportunity to do so, he waived any claim of error.

[11] Appellant next contends that the trial court erred in submitting Instruction 6B, patterned after MAI–CR 3d 313.44. MAI–CR 3d 313.44 requires jurors to fix punishment at life imprisonment if they "unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist." Appellant claims this language could have prevented jurors from considering all mitigating evidence. This Court has repeatedly upheld the constitutional validity of this instruction. *See State v. Reese*, 795 S.W.2d 69 (Mo. banc 1990); *State v. Petary*, 790 S.W.2d 243 (Mo. banc), *cert. denied*, — U.S. —, 111 S.Ct. 443, 112 L.Ed.2d 426 (1990); *Schneider v. State*, 787 S.W.2d 718 (Mo. banc), *cert. denied*, — U.S. —, 111 S.Ct. 231, 112 L.Ed.2d 186 (1990); *Clemmons v. State*, 785 S.W.2d 524 (Mo. banc), *cert. denied*,

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1 524 (Mo. banc), *cert. denied*,

— U.S. ——, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990).

Appellant contends that the court erred in overruling his mistrial motion following this statement made by the prosecutor during *voir dire*: "I'll object. That's going into what's going to happen in the future. It's a discretionary decision for people in the future." Appellant contends that this statement violated the rule of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), that the state must not seek to minimize the jury's sense of responsibility for determining the appropriateness of the death penalty.

[12, 13] The declaration of a mistrial is a drastic remedy to be exercised only in extraordinary circumstances. *State v. Young*, 701 S.W.2d 429, 434 (Mo. banc 1985), *cert. denied*, 476 U.S. 1109, 106 S.Ct. 1959, 90 L.Ed.2d 367 (1986). The trial court has the opportunity to observe the incident giving rise to the request for a mistrial and is in a better position than an appellate court to evaluate its prejudicial effect, thus this Court's review extends only to determining whether as a matter of law the trial court abused its discretion in refusing to declare a mistrial. *Id.*

[14] The prosecutor's objection came during death qualification of the venire panel. Defense counsel asked: "Let me ask generally, does anyone here have the feeling that when we talk about life without probation or parole that it doesn't really mean life without probation or parole?" The prosecutor then made the speaking objection appellant claims was intended to minimize in the minds of the jurors their role in the sentencing process. Appellant contends this was clearly evidenced by a note sent to the court during penalty phase deliberations which read: "Is there any legal situation under which a person can be released who has received life without parole; that is pardoned by the governor. Please distinguish between life in prison and natural life. Are these one in [sic] the same? What is the length of life, capital life?"

There is no *Caldwell* violation. "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989). *Caldwell* prohibits misleading the jury as to their role in the sentencing process; it does not prohibit correct statements of law. *Id. See also State v. Driscoll*, 711 S.W.2d 512, 515 (Mo. banc), *cert. denied*, 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986); *State v. Roberts*, 709 S.W.2d 857, 869 (Mo. banc), *cert. denied*, 479 U.S. 946, 107 S.Ct. 427, 93 L.Ed.2d 378 (1986). There is no reasonable probability here that the statement under scrutiny misled the jury, or improperly described the role assigned to the jury by law. Furthermore, the comment was made during *voir dire*, and was not approved by the court, an important factual difference. *See Darden v. Wainwright*, 477 U.S. 168, 183, n. 15, 106 S.Ct. 2464, 2472, n. 15, 91 L.Ed.2d 144 (1986). Finally, appellant's inference that the statement alluded to possible future executive clemency is meritless. The question was addressed in *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), where the Court held that an instruction permitting a capital sentencing jury to consider the Governor's power to commute a life sentence did not unconstitutionally minimize the jurors' role in the sentencing process. The trial court did not abuse its discretion in refusing to grant a mistrial.

Appellant asserts that the court erred in finding the victim's six year old daughter, Stacy Roam, incompetent to testify and in excluding her prior statements as substantive evidence. Appellant contends that, had Stacy been allowed to testify, she would have corroborated his claim of self-defense.

[15, 16] Section 491.060, RSMo 1986, creates a rebuttable presumption that a child under ten years of age is incompetent to testify except as a victim of certain offenses. *State v. Williams*, 729 S.W.2d 197, 199 (Mo. banc), *cert. denied*, 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987). For a child under the age of ten to be adjudged competent to testify, the child

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must exhibit: (1) a present understanding of, or the ability to understand upon instruction, the obligation to speak the truth; (2) the capacity to observe the occurrence about which testimony is being sought; (3) the capacity to remember the occurrence about which testimony is sought; and (4) the capacity to translate the occurrence into words. *State v. Ray*, 779 S.W.2d 3, 5 (Mo.App.1989). Determination of competency is left to the discretion of the trial court, and its decision will not be reversed absent a clear abuse of discretion. *State v. Johnson*, 694 S.W.2d 490, 491 (Mo.App. 1985).

[17, 18] Appellant contends that Stacy remembered the morning of March 9, 1987, and that she could testify that her mother was gone on that morning, thus bolstering appellant's claim that he killed Barbara the night before in self-defense. Appellant points to Stacy's answer to the question of what Feltrop had told her that morning: "He said right when I woke up in the morning my mom was gone."

Appellant ignores Stacy's prior answers in response to a question of whether appellant had taken her to day care that morning: "A: No, I don't remember that, no. My mom always took me to day care. Q: Right. Do you remember the day when Ralph took you to the day care? A: He didn't take me to day care. I told you, he didn't." Moreover, Stacy was unable to recall where she went to school, or when she started living with Rhonda Mayfield, Stacy's cousin. She exhibited no understanding of the obligation to tell the truth. She was uncooperative and unresponsive during the hearing. The testimony by Stacy's aunt, Rhonda Mayfield, that Stacy could carry on a conversation is not relevant to Stacy's competency either at the time of the occurrence or at trial.

The trial court had the opportunity to observe Stacy throughout the questioning. The court listened to the child's language, and observed her body language, facial expressions, and activities. There is no abuse of discretion in finding Stacy Roam incompetent to testify. Because the court also found that Stacy was incompetent to testify at the time of the crime, appellant's additional contention that he could have used Stacy's prior statements as substantive evidence must fail.

Appellant maintains that the trial court erred in admitting photographs of the victim into evidence during both the guilt and punishment stages of trial. The photographs depict the condition and location of the body as well as the condition and location of the wounds. Appellant contends that the photographs were cumulative, gruesome, unduly inflammatory and irrelevant and that their prejudicial impact outweighed their probative value. Appellant contends the photographs had limited, if any, probative value because the victim's identity was not in dispute nor was the manner of killing or the condition of the corpse, and because defendant relied on self-defense at trial.

[19] The trial court is vested with broad discretion in the admission of photographs. *State v. McMillin*, 783 S.W.2d 82, 101 (Mo. banc), *cert. denied*, — U.S. ——, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990). "Photographs, although gruesome, may be admitted where they show the nature and location of wounds, where they enable the jury to better understand the testimony, and where they aid in establishing any element of the state's case." *State v. Murray*, 744 S.W.2d 762, 772 (Mo. banc), *cert. denied*, 488 U.S. 871, 109 S.Ct. 181, 102 L.Ed.2d 150 (1988). Photographs are also relevant when they depict the condition and location of the body. *State v. Evans*, 639 S.W.2d 820, 822 (Mo.1982). "[A] photograph is not rendered inadmissible because other evidence may have described what is shown in the photograph; nor is the state precluded from introducing the photograph because the defendant expresses a willingness to stipulate to some of the issues involved." *State v. Schneider*, 736 S.W.2d 392, 403 (Mo. banc 1987), *cert. denied*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 871 (1988).

[20] Appellant's contentions are mistaken. The photographs show the torso of the victim in the trunk, the body parts as found in the garbage bag, and close-ups of the various wounds. They are clearly relevant

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to show the nature and condition of the body, the nature and condition of the wounds, to aid the jury in understanding the testimony of the medical examiner, to corroborate testimony of various state's witnesses, and to aid the state in establishing an element of its case. Appellant's contention that the photographs are cumulative is also incorrect; the photographs depict different wounds and views of the body.

"If a photograph is relevant, it should not be excluded because it may be inflammatory, unless the situation is so unusual that the extent of the prejudice overrides the photograph's probative value." *Murray*, 744 S.W.2d at 772. Although the facts here are somewhat more unusual than in *Murray*, where the defendant was convicted of two counts of first degree murder for the execution-style killing of two robbery victims, the prejudicial impact of these photographs nevertheless does not outweigh their probative value. "Insofar as the photographs tend to be shocking or gruesome it is because the crime is of that sort." *State v. Clemons*, 643 S.W.2d 803, 805 (Mo. banc 1983).

This Court has not, as appellant suggests, abandoned its duty to weigh the prejudicial effect of photographs against their probative value. Defendants may not so easily escape the brutality of their own actions; gruesome crimes produce gruesome, yet probative, photographs. The court did not abuse its discretion in admitting the photographs in question.

[21] Appellant next claims that he is entitled to a new trial on the basis of instructional error. The trial court initially submitted a verdict director that did not contain a cross-reference to the self-defense instruction. Appellant correctly notes that the failure to cross-reference is error that is not cured by giving a separate self-defense instruction.

[22] The facts of the present case do not merit reversal. The prejudicial effect of an erroneous instruction given in violation of the notes on use is to be judicially determined. *Rule 28.02(f)*. "Prejudice occurs when an erroneous instruction may adversely influence the jury." *State v. Lingar*, 726 S.W.2d 728, 738 (Mo. banc 1987). Here, the trial court withdrew the initial verdict director only minutes after the jury retired to deliberate and replaced the erroneous verdict director with the correct instruction. If the instruction had at that time been read by the jury, the corrected verdict director would serve to draw attention to the cross-reference to the self-defense instruction. As a consequence, the jury could not have been adversely influenced by the first verdict director, and appellant has suffered no prejudice.

Appellant next contends that the trial court erred in overruling his motion for a judgment of acquittal at the close of all of the evidence because there was no evidence of deliberation.

"In assessing a challenge to the sufficiency of the evidence, the evidence, together with all reasonable inferences to be drawn therefrom, is viewed in the light most favorable to the verdict and evidence and inferences contrary to the verdict are ignored." *State v. Clemmons*, 753 S.W.2d 901, 904 (Mo. banc), *cert. denied*, 488 U.S. 948, 109 S.Ct. 380, 102 L.Ed.2d 369 (1988). This Court's function is not to weigh the evidence but to determine whether there was sufficient evidence from which reasonable persons could have found appellant guilty as charged. *State v. Steward*, 734 S.W.2d 821, 822 (Mo. banc 1987).

[23] Deliberation is defined as "cool reflection for any length of time no matter how brief." § 565.002(3), RSMo 1986. "It is not necessary that the actor brood over his actions for an appreciable period of time." *State v. Ingram*, 607 S.W.2d 438, 443 (Mo.1980). Deliberation may be inferred from the circumstances surrounding the murder. *State v. Antwine*, 743 S.W.2d 51, 72 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988).

[24] Viewing the evidence in the light most favorable to the verdict, there was ample evidence that appellant acted with deliberation. Barbara Roam wrote a note to appellant telling him that she was leav-

ing. There was evidence that she begged her prior boyfriend to take her back because she was afraid "something bad" was going to happen to her. There was evidence that the appellant had caused bruises on the victim. There was evidence that the fatal blow was the second, not the first, attempt to stab the victim. There was evidence from which the jury could infer that appellant planned to conceal the evidence and to cast suspicion upon Roam's former boyfriend. Most significantly, there was evidence that Barbara Roam lived for a period of fifteen minutes to four hours while she bled to death and was conscious for at least part of that time. Appellant could have sought assistance, but he did not. The inferences drawn from the circumstances are strengthened by appellant's failure to seek medical aid. *See State v. Barnes*, 740 S.W.2d 340, 344 (Mo. App.1987); *State v. Dickson*, 691 S.W.2d 334, 339 (Mo.App.1985); *State v. Hurt*, 668 S.W.2d 206, 216 (Mo.App.1984). There is sufficient evidence from which the jury could reasonably infer that appellant acted with premeditation and deliberation.

Appellant maintains that the trial court erred in denying his motions to suppress statements he made to the police because they were the result of coercion and custodial interrogation without the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He also contends the court erred in not suppressing as fruit of the poisonous tree all subsequent statements and physical evidence discovered as a result of his confession.

[25] "Once the admissibility of a statement or confession has been challenged, the burden of proving its voluntariness falls upon the state, which must show voluntariness by a preponderance of the evidence." *State v. Buckles*, 636 S.W.2d 914, 923 (Mo. banc 1982). "The test for 'voluntariness' is whether under the totality of the circumstances defendant was deprived of a free choice to admit, to deny, or to refuse to answer, and whether physical or psychological coercion was of such a degree that defendant's will was overborne at the time he confessed." *State v. Lytle*, 715 S.W.2d 910, 915 (Mo. banc 1986). That there is evidence from which the trial court could have arrived at a contrary conclusion is immaterial. *Id.* at 915–16. When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether the court's decision is supported by substantial evidence, and deference is given to the trial court's superior opportunity to determine credibility of witnesses. *State v. Johns*, 679 S.W.2d 253, 261 (Mo. banc 1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985).

The record shows that late in the afternoon on March 23, 1987, Sgt. Speidel contacted the St. Charles County Sheriff's Department, who asked him to arrange an interview with appellant. After contacting appellant, Sgt. Speidel went to appellant's house. Appellant then followed Sgt. Speidel to the station. Sgt. Speidel and appellant arrived at approximately 8:30 p.m., and appellant waited in the watch commander's office until the St. Charles officers arrived between 10:30 and 11:30 p.m. Sheriff Eubinger and Sgt. Kaiser questioned appellant from 11:45 p.m. to 1:10 a.m. The officers asked appellant about his relationship with the victim, why he reported her missing, and where he thought she might be. During this time appellant seemed tired and emotional, and cried periodically. Finally, the officers asked appellant whether he was a Christian and whether he would tell the truth. Appellant then told the officers that he had "tried to take the knife away." At that time appellant became a suspect and was read his *Miranda* rights, which he waived. Questioning resumed. Appellant related his version of the events. He claimed he killed Roam in self-defense. Later appellant led the officers to the remaining body parts. Using this information, the officers obtained a warrant to search appellant's home and seized evidence found therein.

[26, 27] Appellant first contends that his confession was the result of coercion and was involuntary. The record, contrary to appellant's contention, reveals substantial evidence upon which the trial court

could have based its ruling and evidence sufficient to carry the state's burden of proof on the issue of voluntariness. First, the officers engaged in no coercive conduct. They made no promises or threats. Appellant was given drinks and opportunities to use the restroom and to take breaks. Although the room in which appellant was interviewed was small, there is no indication that appellant was psychologically or otherwise coerced as a result of being in close quarters. When appellant became upset, he was given time to calm himself. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the fourteenth amendment. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). The predicate does not exist here. Secondly, appellant was advised of his *Miranda* rights and voluntarily waived those rights. Although not dispositive of the voluntariness issue, appellant's waiver is an important consideration. *Lytle*, 715 S.W.2d at 915. The record does not support appellant's contention that his confession was the result of coercion.

[23, 29] Appellant also contends that the questioning prior to his confession was custodial interrogation and that his statements should be suppressed because he was not advised of his *Miranda* rights. Appellant's contention must fail. He voluntarily followed Sgt. Speidel to the station. At all times prior to his making the incriminating statement, appellant was free to depart. Even assuming appellant was a suspect in the minds of the officers, there is no custodial interrogation when a suspect is questioned when not under arrest or otherwise restrained of his liberty. *Oregon v. Mathiason*, 429 U.S. 492, 494–95, 97 S.Ct. 711, 713, 50 L.Ed.2d 714 (1977). Furthermore, in the absence of arrest or restraint of freedom of movement, questioning that takes place in a coercive environment does not require *Miranda* warnings. *Id.* at 495, 97 S.Ct. at 713. Finally, even after appellant confessed, he apparently assumed he was free to go; he asked to drive his own vehicle to the discovery site of the body parts so that he could later return home in time to go to work. The trial court did not err in overruling the motions to suppress. Appellant's assertion that all subsequent statements and physical evidence should have been suppressed is likewise denied.

[30, 31] Appellant claims the trial court erred in overruling his objection and request for a mistrial following a statement made during the state's penalty phase closing argument:

> Mr. Applebaum: Dr. Case testified Barbara lived a minimum of fifteen minutes after the fatal wound, and that she was conscious. And that that could have been as much as four hours. The defendant was unable to refute that.

Appellant contends that this was an impermissible reference to his failure to testify.

Appellant's contention is mistaken. A prosecutor may not comment on a defendant's failure to testify, but a prosecutor may make reference to the defendant's failure to offer evidence. *State v. Sidebottom*, 753 S.W.2d 915, 920 (Mo. banc), *cert. denied*, 488 U.S. 975, 109 S.Ct. 515, 102 L.Ed.2d 550 (1988). The prosecutor's statement here is a comment on appellant's failure to offer medical evidence to refute the state's expert testimony. There is no error.

Appellant claims the trial court erred in not instructing the jury about the meaning of "life without parole." The phrase "imprisonment for life by the Division of Corrections without eligibility for probation or parole" is contained in penalty phase Instructions 2B, 5B, 6B and 8B, following MAI–CR 3d 313.31, 313.42, 313.44 and 313.48, respectively. After deliberating for approximately one hour during the penalty phase, the jurors sent this note to the judge:

> Is there any legal situation under which a person can be released who has received life without parole; that is pardoned by the governor. Please distinguish between life in prison and natural life. Are these one in [sic] the same? What is the length of life, capital life.

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The court's written response to the jury was, "You must be guided by the instructions that the court has given you."

[32] Appellant's claim is without merit. When MAI notes on use do not provide for a definition, the court must not give one. *State v. Leisure*, 772 S.W.2d 674, 679 (Mo. App.1989) (citing MAI–CR 2d 33, Notes on Use), *cert. denied*, — U.S. —, 110 S.Ct. 724, 107 L.Ed.2d 743 (1990); MAI–CR 3d 333.00, Notes on Use 1–2. A definition is not to be given "even if requested by counsel or the jury." MAI–CR 3d 333.00, Notes on Use 2F. None of the notes on use for the MAIs involved here provides for definitions of terms.

[33] Failure to define words of common usage which would not confuse the jury does not constitute prejudice. *State v. Rodgers*, 641 S.W.2d 83, 85 (Mo. banc 1982). Had the instructions simply used the phrase "imprisonment for life," appellant's argument might have merit. Here, however, the phrase is modified by the words "without eligibility for probation or parole." The meaning of the words is clear.

This Court notes *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990), and *Bruce v. State*, 318 Md. 706, 569 A.2d 1254 (1990), cited by appellant, but does not find the cases persuasive.

Appellant contends his death sentence cannot stand because the one aggravating circumstance, submitted by Instruction 4B, was unconstitutionally vague. The instruction read:

> In determining the punishment to be assessed against the defendant for the murder of Barbara Ann Roam, you must first unanimously determine whether the following aggravating circumstance exists:
>
> Whether the murder of Barbara Ann Roam involved torture and or [sic] depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

The instruction tracks the language of MAI–CR 3d 313.40. The jury found as an aggravating circumstance beyond a reasonable doubt: "The murder of Barbara Ann Roam involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman." The jury did not find that the murder involved torture.

In *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court restates the analysis to be used in reviewing a state's application of a statutory aggravating circumstance. The federal court "must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Id.* 110 S.Ct. at 3057. If so, the court must then "determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer." *Id.*

[34, 35] This Court first acknowledges that the language "depravity of mind ... outrageously or wantonly vile, horrible or inhuman," without further definition, is too vague to provide adequate guidance to a sentencer. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Seeking to give substance to the terms, however, this Court has articulated a limiting construction of the aggravating circumstance at issue in this case. *State v. Preston*, 673 S.W.2d 1, 11 (Mo. banc), *cert. denied*, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). The factors to be considered in determining whether depravity of mind exists include: mental state of defendant; infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse; and the nature of the crime. *Preston*, 673 S.W.2d at 11. The limiting construction employed by this Court requires that at least one of the *Preston* factors be present before this Court will find that the evidence supports a finding of depravity of mind. *Griffin*, 756 S.W.2d at 490.

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The problem in this case rests upon the fact that the limiting definition was not given to the jury. In the absence of additional facts and circumstances revealed in the record in this case, vacation of the sentence might be required. *Walton*, however, indicates otherwise.

The Supreme Court of the United States stated in *Walton*:

> Walton's final contention is that the especially heinous, cruel or depraved aggravating circumstance as interpreted by the Arizona courts fails to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments. Walton contends that the Arizona factor fails to pass constitutional muster for the same reasons this Court found Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance to be invalid in *Maynard v. Cartwright*, 486 U.S. 356 [108 S.Ct. 1853, 100 L.Ed.2d 372] (1988), and Georgia's "outrageously or wantonly vile, horrible or inhuman" circumstance to be invalid in *Godfrey v. Georgia*, 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398] (1980).
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> *Maynard v. Cartwright* and *Godfrey v. Georgia*, however, are distinguishable in two constitutionally significant respects. First, in both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 U.S., at 358–359, 363–364 [108 S.Ct. at 1856, 1859;] 446 U.S., at 426 [100 S.Ct. at 1763]. Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the State appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 U.S., at 364 [108 S.Ct. at 1859;] 446 U.S., at 429 [100 S.Ct. at 1765.] These points were crucial to the conclusion we reached in *Maynard*. See 486 U.S., at 363–364 [108 S.Ct. at 1859.] They are equally crucial to our decision in this case.
>
> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor.

110 S.Ct. at 3056–57.

In *Lewis v. Jeffers*, — U.S. —, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), the Supreme Court of the United States reiterates the holding of *Walton*:

> Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting ... the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U.S., at 362, 108 S.Ct. at 1858, has been satisfied.

The reasoning of *Walton* applies to the present case. Missouri law authorizes a sentencing procedure of a hybrid nature—a procedure presented by the facts and circumstances of this case. The jury announced a sentence, yet the trial judge acted, within the meaning of *Walton*, as the "final sentencer." *Rule 29.05*, vests in the trial court the "power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive." Appellant sought relief under *Rule 29.05*. He filed a motion for reduction of sentence in which he contended that the evidence failed to establish beyond a reasonable doubt that

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any aggravating circumstance existed. He further claimed that both § 565.032.2(7) and Instruction 4B were unconstitutional. The judge conducted a hearing on the motion after which he stated on the record: "On the defense counsel's rather eloquent plea for reduction of sentence, the Court has listened attentively to that and has recalled the testimony and the evidence in this cause,[1] and the Court will overrule the Motion for Reduction of Sentence at this time."

[36] Considering the procedure under which appellant was ultimately sentenced, this Court is not required to vacate the sentence solely on the basis that the jury announced the sentence. On the authority of *Walton*, this Court presumes that the trial judge knew and applied the relevant factors enunciated in *State v. Preston* when he evaluated and ruled on appellant's motion for reduction of sentence. Also on the authority of *Walton*, it is therefore irrelevant in this case that § 565.032.2(7) and Instruction 4B did not narrow the construction of the language in question. This Court concludes that § 565.032.2(7) and Instruction 4B, as construed by this Court and as presumed to have been applied by the trial court, furnished sufficient guidance to the final sentencer.

Appellant urges this Court to set aside his death sentence pursuant to the review mandated by § 565.035.3, RSMo 1986, which requires this Court independently to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstances found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

This Court has considered the record, including issues raised in this and four other points, and finds no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[37] The evidence in this case supports the finding that the murder of Barbara Ann Roam involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman. The victim bled to death over a period of fifteen minutes to four hours. As the trial judge concluded in his Report of the Trial Judge, "[t]he victim suffered a deep, heavy stab wound to the neck that resulted in paralysis and the severing of the vertebral artery resulting in her slowly bleeding to death while paralyzed but conscious." This tends to show that appellant had the "mental state" contemplated by the first *Preston* factor. In *Griffin*, this Court elaborated on this factor: "[t]he 'mental state of defendant' factor means that the defendant must have acted with callous disregard for the sanctity of life as, for instance, where the defendant plans a robbery with the intent to kill all witnesses ... or where the victim was killed while helplessly bound, after being otherwise incapacitated, or after complying with all of defendant's demands without resistance." *Griffin*, 756 S.W.2d at 490. In the present case the victim lay alive but helpless for an unknown period of time. Appellant could have obtained medical help for her, yet he chose not to do so. Akin to killing an incapacitated person, the behavior evidences a "callous disregard for the sanctity of life."

1. In his Report of this case, the trial judge found the sentence appropriate and described the offense for which the penalty was imposed:
> "Defendant was charged with first degree murder involving the death of Barbara Ann Roam by severing the cervical chord at C5 and severing the vertebral artery with a heavy knife struck with considerable force causing the then paralyzed victim to bleed to death slowly from fifteen minutes to four hours. After allowing the victim to bleed to death through the small vertebral artery, the victim's body was dismembered and her torso was found in a trunk in St. Charles County and her head, hands, feet, arms and legs were found in a stock watering pond in Jefferson County."

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There was also evidence of appellant's lack of remorse. *See Preston*, 673 S.W.2d at 11. Appellant developed and carried out a plan to conceal his involvement in the crime. He carved the victim's body to conceal it and to render it difficult to identify. Appellant hid the body parts in separate locations. A section of blood stained carpet in appellant's bedroom had been removed and replaced. In an attempt to conceal his act, appellant enlisted the unknowing aid of the victim's family and friends. He authored a note, purportedly to the victim, after her death. He telephoned the victim's mother to report that her daughter was missing. He told other of Barbara Roam's relatives that she had gone somewhere. Appellant placed some of the body parts in a location that would cast suspicion on Roam's former boyfriend. Such detailed efforts to destroy incriminating evidence and to escape detection indicate lack of remorse. *State v. Rodden*, 728 S.W.2d 212, 222 (Mo. banc 1987); *State v. Lingar*, 726 S.W.2d 728, 741 (Mo. banc), *cert. denied*, 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987).

There was testimony that appellant decapitated the body of Barbara Roam, severed her hands at the wrists, severed her legs at the knees, and severed one foot. Appellant inflicted additional wounds, evidencing other attempts to dismember the body. There was ample evidence to show the mutilation of the victim's body after death. *See Preston*, 673 S.W.2d at 11.

[38] Section 565.035.3(3) requires this Court to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence and the defendant. For purposes of this section, the Court has examined those capital murder and first degree murder cases in which death and the alternative sentence of life imprisonment have been submitted to the jury and the sentence has been affirmed on appeal. This Court concludes that the penalty imposed in this case is not excessive or disproportionate to the penalties imposed in similar cases, considering the crime, the strength of the evidence and the defendant. The cases most similar to this case are: *State v. Jones*, 705 S.W.2d 19 (Mo. banc), *cert. denied*, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 574 (1986); *State v. Walls*, 744 S.W.2d 791 (Mo. banc), *cert. denied*, 488 U.S. 871, 109 S.Ct. 181, 102 L.Ed.2d 150 (1988); *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983), *cert denied*, 466 U.S. 993, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984); and *State v. Bolick*, 706 S.W.2d 847 (Mo. banc), *cert. denied*, 479 U.S. 903, 107 S.Ct. 302, 93 L.Ed.2d 276 (1986). The evidence in this case shows that appellant stabbed his live-in girl friend in the neck with considerable force, allowed her to bleed to death, dismembered the body, and dumped the parts in two different locations as a part of a scheme to conceal his involvement in the murder. There is no doubt that appellant committed these acts. His contention that the evidence of deliberation is insufficient has been rejected. Appellant's punishment is not excessive or disproportionate.

Plain Error

[39] On appeal appellant raises twenty-one points and at least twenty-six subpoints, numerous of which contain allegations of error unsupported by objections at trial and/or not preserved in the motion for new trial. Review of these claims is limited to the standard of plain error. Plain error exists only when the court finds that a manifest injustice or a miscarriage of justice has occurred. *Rule 30.20; State v. McMillin*, 783 S.W.2d 82, 95 (Mo. banc), *cert. denied*, — U.S. —, 111 S.Ct. 225, 112 L.Ed.2d 179 (1990).

[40, 41] Appellant alleges the trial court committed plain error in not declaring, *sua sponte*, a mistrial following the state's guilt phase closing argument. He claims the following argument was an impermissible comment on his failure to testify:

> And when you think about self-defense, let me tell you something. You remember this. Put yourself in our position just a second. How do you disprove self-defense? There was only two people there, and one of them is dead and can't talk for herself.

The prosecutor's argument was improper and under different circumstances might constitute reversible error. *See State v. Williams*, 673 S.W.2d 32, 35 (Mo. banc 1984). The trial court was prepared to sustain appellant's motion for a mistrial and so informed all counsel. Appellant nevertheless withdrew his motion. He took the stand and testified that he understood he was waiving any claim of error regarding this specific argument. He was questioned by his counsel and by the court at great length. It is apparent that appellant made an informed and deliberate choice to, as it were, gamble on the verdict. He unequivocally waived his objection to the prosecutor's comment and may not now claim error. *See State v. Mallett*, 732 S.W.2d 527, 538 (Mo. banc), *cert. denied*, 484 U.S. 933, 108 S.Ct. 309, 98 L.Ed.2d 267 (1987). Appellant's additional contention that this comment was a deliberate attempt to poison the jury or provoke a mistrial is not supported by the record.

[42] Appellant claims that a question during the cross-examination of a penalty phase witness impermissibly converted a mitigating circumstance submitted to the jury into an aggravating factor. One of appellant's high school teachers testified on direct examination that when appellant was a student "most students picked on him and teased him," that in response "he took it, sort of cried," that he "didn't want to go to the restroom when other boys were in there," and that "he was basically a loner." The prosecutor pursued this on cross-examination:

> Q: Did you find his behavior that he wouldn't go into the restroom when other boys were in there as different or strange as it related to other—?
>
> A: To some degree, yes.
>
> Q: Were there other behaviors of Mr. Feltrop that you noticed or that you can speak of as being rather strange ...
>
> A: Just that kids picked on him and teased him. He might have created some of his own problems. But, some kids are that way, though, just a growing up process.
>
> . . . . . .
>
> Q: Did you ever have a conversation with Ralph Feltrop about these strange behavior patterns?
>
> A: Not that I recall, no.

One of the mitigating circumstances the jury was instructed to consider was "[t]he personal background and history of the defendant." Appellant claims that the state's final question was an effort to denigrate and recharacterize appellant's "dysfunction" as an aggravating rather than mitigating factor. Appellant relies on a line of cases holding that in capital cases the sentencer must not be precluded from considering, *as a mitigating factor*, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). Appellant's reliance is misplaced. Appellant does not claim he was precluded from presenting any mitigating evidence. He does claim that what was offered as mitigating evidence was argued by the prosecutor as aggravating evidence contrary to *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983). The record does not support appellant's contention that the state argued that appellant's personal background and history constituted an aggravating factor. The state's questions were designed to demonstrate that appellant's behavior as a student was not unusual enough for a teacher to have felt compelled to discuss the behavior with appellant. The state's argument went to the fact that appellant's behavior was simply insufficient to be considered as a mitigating circumstance. The trial court did not plainly err in failing to declare a mistrial.

[43] Appellant claims that the prosecutor's statement that this was the "proper case" for the death penalty should have led to a mistrial. The prosecutor used the phrase several times:

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Back in jury selection, a week ago, each of you said that, in the proper case you could vote to impose the death penalty. And this is that case. Can you conceive of a more appropriate case? The Defendant knowingly killed Barbara Roam and then went one step further and mutilated her....

He had a choice not to carry her into the bathroom and allow her to bleed to death and allow her to die. He has made his choice. And now there is no other choice. This is the proper case. Can you conceive of a more appropriate case? ...

Now, in the proper case each and every one of you gave me your word, and you said in the proper case you could vote death. I believed you then and I believe you now. Can you conceive of a more proper case, where a guy murdered someone and let them bleed for at least fifteen minutes? We know she was paralyzed....

And he made a choice, a choice to kill, a choice to let her bleed to death and a choice to dismember her. This man deserves the death penalty. Basically, ladies and gentlemen, can you conceive of a more proper case?

Appellant argues that the repeated reference to the "proper case" was improper because it indicated to the jury that the sentencing decision had already been made, perhaps by the legislature, or that the prosecutor had compared this case to all other first degree murder cases and had determined it to be a proper case for the death penalty. Appellant claims that this violates the rule in *Caldwell v. Mississippi*, 472 U.S. 320, 328–29, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985), which prohibits "rest[ing] a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Appellant also submits that the prosecutor injected his personal opinions and viewpoints into the process and implied that he possessed additional personal knowledge of the case, contrary to *Drake v. Kemp*, 762 F.2d 1449 (11th Cir.1985), *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 738 (1986), and *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *cert. denied*, 478 U.S. 1022, 106 S.Ct. 3337, 92 L.Ed.2d 742 (1986).

There is no violation of *Caldwell*. The prosecutor told the jury plainly, "It is now your duty to determine what punishment the Defendant is to receive." Nothing in the prosecutor's statements undermines the jury's understanding of its responsibility to act as sentencer. Appellant's argument that the prosecutor injected his own opinions or implied additional knowledge is also not supported by the record. The prosecutor supported his statements that this was a "proper case" by noting details of the crime. He did not rely on personal opinion or imply that he had additional information. In the penalty phase of a capital murder case both parties should be given wide latitude in arguing the matter of punishment. *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied*, 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985), citing *Gregg v. Georgia*, 428 U.S. 153, 203–04, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976). There is no plain error.

The Court has exhaustively examined each and every other point and subpoint of plain error asserted by appellant and finds no plain error and concludes appellant received a fair trial.

RULE 29.15

[44] Appellant makes numerous claims of ineffective assistance of counsel. A substantial number of claims were not raised in the motion court, thus are not proper subjects for review. This Court notes, however, that substantially all of the issues raised on appeal but not presented below have been considered in the direct appeal. In certain other claims appellant complains of the effectiveness of his motion counsel. A postconviction proceeding is not to be used to challenge the effectiveness of counsel in the postconviction proceeding. *Lingar v. State*, 766 S.W.2d 640, 641 (Mo. banc), *cert. denied*, — U.S. —, 110 S.Ct. 258, 107 L.Ed.2d 207 (1989). This Court addresses the three claims of ineffective

assistance of counsel raised in the motion court.

The movant has the burden of proving his grounds for relief by a preponderance of the evidence. *Rule 29.15(h)*. This Court's review of a denial of postconviction relief is limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous. *Rule 29.15(j)*. The findings and conclusions are deemed clearly erroneous only if a full review of the record leaves the appellate court with the definite and firm impression that a mistake has been made. *Sidebottom v. State*, 781 S.W.2d 791, 795 (Mo. banc 1989), *cert. denied*, — U.S. —, 110 S.Ct. 3295, 111 L.Ed.2d 804 (1990).

[45, 46] To show that counsel's assistance was so defective as to require reversal of a conviction or death sentence, the movant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690, 104 S.Ct. at 2066. The movant must also overcome the presumption that the challenged action was sound trial strategy. *Id.* at 689, 104 S.Ct. at 2065. To show prejudice, the movant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. at 2068.

[47] Appellant claims counsel was ineffective because he waived a mistrial. The following exchange occurred during the guilt phase closing argument:

> Mr. Finnical: ... Put yourself in our position just a second. How do you disprove self-defense? There was only two people there, and one of them is dead and can't talk for herself. The Judge has read to you the instruction—
>
> Mr. Schmidt: Judge, I object. May we approach the bench?

Out of the hearing of the jury, counsel moved for a mistrial on the ground that the state commented on appellant's failure to testify. The trial court overruled the motion. Following closing arguments, the jury began deliberations. After a weekend adjournment, the state indicated that it was prepared to consent to appellant's motion for mistrial. Counsel then attempted to withdraw the motion. The trial judge stated that he had prepared an order sustaining the motion. After discussion, counsel withdrew both his objection and the motion for mistrial. The trial court and both counsel then examined appellant, who specifically waived the objection and the motion.

The motion court found counsel's decision, "viewed from that point in history, was reasonable." At the hearing, counsel testified that he felt that the state had committed errors which would not be repeated on retrial. He felt that Dr. Case, the state's expert forensic witness, had given inconsistent testimony on a fairly substantial point and that the state had made a mistake in calling Bill Mangrum, the victim's former boy friend. He also thought the jury selection process had gone well for appellant. Counsel stated that he did not want a mistrial because there would certainly be a retrial since the state would not dismiss the charges and appellant would not plead guilty to reduced charges. The motion court's conclusion that counsel's judgment was reasonable is not clearly erroneous.

[48] Appellant next claims counsel was ineffective because he did not allow appellant to testify in either the guilt or penalty phase. The motion court found that appellant did not request to testify. Specifically, the motion court found that "Feltrop's testimony that he requested to testify is not believable."

Appellant testified in the motion hearing that he told his attorney several times before trial and during the guilt phase that he wanted to testify and that he did not like the defense of self-defense. Counsel, on the other hand, testified that during the pretrial period appellant changed his mind several times about the defense he wanted to present. Counsel investigated several theories, finally deciding to present a de-

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fense of self-defense. Appellant also continually changed his "story" throughout the trial. Counsel testified that he and appellant "had quite a few conversations on his right and ability to testify" and that appellant understood that right. Counsel believed that if appellant testified, he would deny having committed the crime, and this would likely diminish his credibility. Counsel advised appellant not to testify in the penalty phase. Counsel testified that the only time appellant mentioned an intent to testify was after the close of evidence in the penalty phase. Counsel testified that he thought appellant was "playing games with me at that point." Appellant's testimony would have been contrary to the theory advanced by counsel, and counsel was not ineffective for not calling appellant to testify. After reviewing the record, this Court is not left with the definite and firm impression that a mistake has been made. *See Sidebottom*, 781 S.W.2d at 795.

[49] In his motion, appellant asserts that counsel was ineffective because he failed to present expert testimony from a psychiatrist or psychologist regarding appellant's mental condition, which could have been presented as a mitigating circumstance. In his brief, however, appellant claims ineffective assistance in counsel's failure to present psychiatric testimony in support of a defense based on the battered spouse syndrome. The motion court found counsel's tactical decision not to call a mental health professional appropriate.

The record supports the motion court's finding. Appellant's original plea was not guilty by reason of mental disease. Max Givon, a forensic psychologist, conducted a pretrial examination of appellant on June 22, 1987, pursuant to Chapter 522, RSMo. Dr. Givon concluded that appellant had no mental disorder and did not suffer from a mental disease or defect that would excuse him from criminal responsibility for his actions.

Appellant filed a motion for a second examination. A.E. Daniel, M.D., examined appellant on October 3, 1987. Dr. Daniel also found that appellant did not suffer from a mental disease or defect, but recommended that his "state of mind, particularly as it relates to constant battering by the victim should be given some consideration as a mitigating factor when the degree of the offense is considered and later at the penalty stage." Appellant then filed notice of intention to offer evidence of battered spouse syndrome.

The state then sought an examination. Joseph Shuman, M.D., examined appellant on February 9, 1988. Dr. Shuman had opportunity to review the two previous reports before making his examination. He agreed that there was no evidence to show that at the time of the alleged offense appellant did not know or could not appreciate the nature, quality and wrongfulness of his conduct nor that he was incapable of conforming his conduct to the requirements of the law. In discussion of the battered spouse syndrome, Dr. Shuman found that "[i]f descriptions are accurate, as given by Mr. Feltrop, then by definition he would be considered to be a victim of abuse."

Daniel Cuneo, a licensed clinical psychologist, testified at the motion hearing. He had reviewed the three reports and administered a personality inventory to appellant prior to the motion hearing. He testified that appellant suffers from a mental disorder and had probably suffered from the disorder since early in high school. The disorder did not qualify as a mental disease or defect under Chapter 552. In Dr. Cuneo's opinion, a fight with the victim may have triggered a "rage reaction" in appellant, consistent with his mental disorder. Dr. Cuneo also opined that all of the reports were consistent with each other and could have been presented during the penalty phase.

Counsel testified at the motion hearing that he had originally anticipated calling Dr. Daniel during both the guilt and penalty phases, but decided not to call him because cross-examination would elicit statements made by appellant to Dr. Daniel inconsistent with the defense of self-defense. Counsel also determined that he could call lay witnesses to emphasize traits

of appellant that could be considered in mitigation and thereby avoid adverse testimony from the experts.

The record reflects that counsel investigated psychiatric evidence to support a defense premised on battered spouse syndrome and to demonstrate mitigating circumstances. His choice not to present expert testimony was based on reasonable trial strategy. The motion court's finding was not clearly erroneous.

The conviction, sentence, and judgment of the postconviction hearing court are affirmed.

ROBERTSON, RENDLEN, HIGGINS and BILLINGS, JJ., concur.

BLACKMAR, C.J., concurs in part and dissents in part in separate opinion filed.

HOLSTEIN, J., concurs in part and dissents in part in concurring in part and dissenting in part opinion of BLACKMAR, C.J.

BLACKMAR, Chief Justice, concurring in part and dissenting in part.

I concur in the affirmance of the conviction and the order denying 29.15 relief.

I cannot, however, accept the startling proposition that error in the instruction submitting the single statutory aggravating circumstance may be corrected by the action of the trial court in ruling the application for reduction in sentence, under the authority of Rule 29.05. The simple reason is that there is no assurance that the jury would have authorized a death sentence if it had been properly instructed in accordance with *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and the limiting construction announced in *State v. Preston*, 673 S.W.2d 1, 11 (Mo. banc 1984).

The instruction, as given, submitted the single aggravating circumstance that "the murder ... involved torture and/or [sic] depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman." Section 565.032.2(7), RSMo 1986. The principal opinion properly found that this submission conflicts with *Godfrey*. The instruction also runs afoul of *Maynard v. Cartwright*. *See also, Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.1989) *cert. denied, Delo v. Newlon*, — U.S. —, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). The fault in the instruction is that it fails to instruct the jury with sufficient precision as to the findings which must be made to lay the foundation for a death sentence. In our idiom, the instruction gives the jury a roving commission.

In *Preston* we sought to flesh out the essential requirements of the "depraved mind" submission, in order to channel the jury's inquiries along lines sufficiently definite to stand constitutional scrutiny. The present jury, however, was not instructed in accordance with the *Preston* guidelines. As the Supreme Court of the United States makes clear, the direction to the jury is not adequate unless the narrowing construction is given to the jury in the form of instruction. In *Walton v. Arizona*, — U.S. —, 110 S.Ct. 3047, 3056–7, 111 L.Ed.2d 511 (1990), the court says:

> When the jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury on the bare terms of an aggravating circumstance. That is unconstitutionally vague on its face. ...

It is significant that this jury specifically excluded "torture" in its reported finding. It must be assumed, therefore, that it was unwilling to make the explicit finding of torture which might possibly sustain its death verdict. *See Mercer v. Armontrout*, 844 F.2d 582 (8th Cir.1988), *cert. denied*, 488 U.S. 900, 109 S.Ct. 249, 102 L.Ed.2d 238 (1988).

The principal opinion now tries to save the verdict, relying on *Walton*, by holding that the trial judge is the "final sentencer."[1] *Walton*, by its express statement is limited to cases of judge sentencing rather

1. It would be equally logical to argue that the governor acts as "final sentencer" according to § 565.020.2, RSMo, which grants the governor power to "release" the defendant.

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than jury sentencing, in accordance with Arizona practice. *Id.* 110 S.Ct. at 3051. The principal opinion would extend *Walton* so as to save the death sentence in this case. I believe that this attempt runs counter to basic principles of Missouri law, which commits the assessment of the death sentence, if appropriate aggravating circumstances are found, to the complete discretion of the jury. § 565.030.4, RSMo 1986.

It is inaccurate to say that the judge is the final sentencer, because the judge may pronounce a death sentence only if the sentence is authorized by a jury, or if the jury has found aggravating circumstances and has explicitly reported its failure to agree on the sentence. § 565.032, RSMo 1986. Unless the jury is properly instructed, its verdict cannot support a sentence of death. It simply cannot be assumed that a properly instructed jury would have returned a death sentence. I am quite prepared to agree that the trial court, in ruling the 29.05 motion for reduction of sentence, gave attention to the *Preston* formulation. But the jury did not have the benefit of this formulation. I am aware of no other situation in which Missouri law authorizes the trial court to correct a verdict which is based on an erroneous instruction.

Walton is not sufficient authority because it involves judge sentencing rather than jury sentencing. Perhaps the Supreme Court of the United States will not disturb this Court's radical alteration of the requirements of Missouri law, concluding that we have the authority to allocate the sentencing function between judge and jury as we see fit. The legislature has already allocated these functions.

But we should be true to our own law and traditions. Up to now the right of trial by jury has been considered to be a right of trial by a properly instructed jury. The principal opinion is judicial legislation substantially altering the right of trial by jury in death cases. I cannot join it. We should not strain to affirm death sentences. We should, if anything, insist on stricter adherence to procedural requirements when the ultimate penalty is at stake.

I would vacate the death sentence and remand the case for further proceedings consistent with the views here expressed.

ANCHOR CENTRE PARTNERS, LTD., a Missouri limited partnership, Barton J. Cohen, A. Baron Cass III, Robert L. Swisher, Jr., Robert M. Freeman, Kroh Camelback Associates I Limited Partnership, Kroh Camelback Associates III Limited Partnership, Equity Partnerships Corp., E.A. Financial Corp., and Barton J. Cohen, Byron C. Cohen, Robert J. Shapiro, A. Baron Cass III, Robert L. Swisher, Jr., Patrick F. Healy and Charles M. Herman, as all of the partners of Equity Analysts, a Missouri general partnership, Respondents,

v.

MERCANTILE BANK, N.A., Appellant,

and

Merchants Bank, a Missouri state-chartered banking association, Respondent.

No. 71974.

Supreme Court of Missouri,
En Banc.

Jan. 9, 1991.

Limited partners whose notes were given as security for loan made to general partner and who were also contingent obligors if standby letters of credit were drawn upon filed suit to be absolved of their liability to lender. Lender counterclaimed to enforce notes and letters and also claimed that limited partners were unjustly enriched. The Circuit Court of Jackson County, William J. Marsh, Senior Judge, entered declaratory judgment that lender had no right or interest in notes or letters and also entered damages award against lender for fraud. Lender appealed.

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI, Respondent,	)	
vs.	)	S.Ct. No. 70896
RALPH C. FELTROP, Appellant.	)	

RALPH C. FELTROP, Appellant,	)	
vs.	)	
STATE OF MISSOURI, Respondent.	)	

MOTION FOR REHEARING AND SUGGESTIONS IN SUPPORT THEREOF

Comes now appellant, Ralph C. Feltrop, by and through counsel, and, pursuant to Missouri Supreme Court Rules 30.26 and 84.17, requests that this Court grant a rehearing from its opinion rendered in this cause on January 9, 1991. In support thereof, appellant submits as follows:

1. The Court's principal opinion is in error where it finds that, although the sole statutory aggravating circumstance submitted to the jury and thereafter found by it was "too vague to provide adequate guidance to a sentencer," slip op. at 23, vacation of the sentence is not required. In so finding, this Court's opinion overlooks or misinterprets material matters of law and fact and conflicts with the general principle and constitutional right that the right to a jury trial includes the

right that the jury that finds guilt and authorizes a sentence be properly instructed. It further conflicts with the constitutional principles enunciated in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that the jury, which makes the decision to impose the death penalty, must be properly instructed on all facets of the case.

2. This Court's opinion states that, with respect to appellant's assertion that the sole aggravating circumstance, submitted in Instruction 4B, and, based on Section 565.032.2(7) RSMo, was unconstitutionally vague, "This Court . . . acknowledges that the language 'depravity of mind . . . outrageously or wantonly vile, horrible or inhuman,' without further definition, is too vague to provide adequate guidance to a sentencer." Slip op. at 23. This Court's opinion thus concedes that, as submitted to the jury, the sole aggravating circumstance does not survive constitutional scrutiny under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

3. This Court's opinion goes on to state, however, that under Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047 (1990), it is "irrelevant in this case that Section 565.032.2(7) and Instruction 4B did not narrow the construction of the language in question." Slip op. at 26.

4. It is an established cornerpost of Eighth Amendment jurisprudence that, because of the qualitative difference between death and all other penalties, a greater degree of reliability in

the determination that death is the appropriate punishment in a specific case is mandatory. Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion). Further, because of that qualitative difference, the sentencer's discretion to return a death sentence must be constrained and guided by specific standards to ensure that the death penalty not be inflicted arbitrarily or capriciously. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam); Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976). The requirement that the sentencer's discretion in imposing the death penalty be channelled and limited is a fundamental constitutional requirement. Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988). The United States Supreme Court has repeatedly held that unbridled sentencing discretion is unacceptable, and the state must establish rational guidelines that narrow and focus the sentencer's judgment. Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); McCleskey v. Kemp, 481 U.S. 279, 305, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987). Finally, in order that a sentencer's discretion be adequately guided so as to ensure that the death penalty not be imposed in an arbitrary and capricious fashion, that sentencer must be properly instructed. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In Hitchcock, the United States Supreme Court held that there exists a constitutional requirement that a jury be properly instructed as to the existence of non-statutory mitigating circumstances and

as to the jury's ability to consider those circumstances. 107 S.Ct. at 1824. The Court required that the jury be properly and accurately instructed because the jury imposes sentence in Florida and, although the trial judge may override the jury's determination, he gives great weight to that determination in making his own decision.

5. Appellant submits that, by its opinion, this Court has ignored these fundamental precepts of constitutional law. This Court's opinion recognizes that the sole statutory aggravating circumstance submitted "is too vague to provide adequate guidance to a sentencer", slip op. at 23, and, thus, implicitly concedes that, because the sentencer was not adequately guided, no assurance exists that the death penalty was not imposed arbitrarily and capriciously. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988). This Court's opinion then makes the quantum leap, unsupported by precedent or logic, that this failure to properly instruct the jury on the sole aggravating circumstance does not require the vacation of appellant's death sentence. As Chief Justice Blackmar noted in his opinion concurring in part and dissenting in part, in which he was joined by Justice Holstein, this Court's opinion is unsupportable because "there is no assurance that the jury would have authorized a death sentence if it had been properly instructed in accordance with Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), and the limiting construction announced in State v. Preston, 673

S.W.2d 1, 11 (Mo. banc 1984)," dissenting slip op. at 1-2 (Blackmar and Holstein, JJ.).

This Court's opinion relies on Walton v. Arizona, ___ U.S. ___, 110 S.Ct. 3047 (1990), to support its premise that the judge, not the jury, is the "final sentencer" and, thus, that it is irrelevant that the jury was improperly instructed. Slip op. at 25-26. This Court's opinion's reliance on Walton is misplaced. First, as Chief Justice Blackmar correctly noted in his dissenting opinion, "Walton, by its express statement is limited to cases of judge sentencing rather than jury sentencing, in accordance with Missouri practice," dissenting slip op. at 3. In Arizona, radically distinct from the Missouri procedure, it is the judge, not the jury, who makes the determination as to sentence. 110 S.Ct. at 3051-52. Thus, in Arizona, the jury is not the sentencer within any definition of the word.

In Missouri, however, Section 565.030.4 RSMo 1986 "commits the assessment of the death sentence, if appropriate aggravating circumstances are found, to the complete discretion of the jury." Dissenting slip op. at 3. The statute specifically refers to the jury as "the trier" and gives to "the trier" the right and obligation to assess and declare punishment. Section 565.030.4 RSMo 1986. The trial judge cannot be described as the "final sentencer" under the Missouri procedure because, unless it is a jury-waived trial, the trial judge can only pronounce a death sentence if either the jury authorizes the imposition of the death penalty or if the jury finds aggravating circumstance(s) but then informs the trial judge that it cannot agree on the

sentence. Dissenting slip op. at 3; Sections 565.030-.032 RSMo 1986. In a jury-tried case, the trial judge is absolutely forbidden by statute to pronounce a death sentence if the jury has specifically determined that a life sentence is appropriate or that no aggravators exist. Thus, under Missouri's procedure, the trial judge cannot be deemed the "final sentencer", and the reasoning of Walton v. Arizona is inapplicable.

The jury must be properly instructed to comport with the fundamental Eighth Amendment requirement that we be assured that the death penalty will not be imposed in an arbitrary and capricious manner. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Lacking the proper instruction, "It simply cannot be assumed that a . . . jury would have returned a death sentence." Dissenting slip op. at 3.

7. Appellant further notes that, until this Court's opinion, the courts had uniformly held that the right to a trial by jury necessarily includes the right to a properly instructed jury. See e.g. State v. Carter, 585 S.W.2d 215 (Mo. App., S.D. 1979); State v. Williams, 692 S.W.2d 307 (Mo. App., E.D. 1985); United States v. Thomas, 895 F.2d 1198 (8th Cir. 1990). In Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), the United States Supreme Court reversed a Florida death sentence because "the jury was not instructed to consider . . . evidence of nonstatutory mitigating circumstances." 107 S.Ct. at 1824. The theoretical underpinning of Hitchcock rested upon the requirement that a jury be properly instructed. If a jury must receive accurate instructions about what is a mitigating

circumstance and how mitigating circumstances are to be weighed against aggravating circumstances, it follows that the jury must also be fully and accurately instructed upon the available aggravating circumstance(s). Hitchcock would be nothing more than a hollow shell if the jury's decisional scales could be tipped toward death by an overbroad and vague aggravating circumstance that does not "suitably direct[] and limit[]" the sentencing authority's discretion. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

8. Because the jury was improperly instructed in this case as to the sole aggravating circumstance submitted, a circumstance that this Court's opinion admits is unconstitutionally vague, slip op. at 23, it cannot be assumed that, had the jury been properly instructed, it would have even returned a death sentence. Appellant thus submits that his death sentence must be vacated and the cause remanded so that he can be resentenced to life imprisonment without probation or parole.

9. This Court's opinion is also in error when it states that "Section 491.060, RSMo 1986, creates a rebuttable presumption that a child under ten years of age is incompetent to testify except as a victim of a sexual offense." Slip op. at 11. The clear language of the statute indicates that the exception to that presumption applies to any "child under the age of ten who is alleged to be a victim of an offense under Chapter 565, 566 or 568, RSMo." Section 491.060(2) RSMo. Thus, this Court's opinion mistakenly asserts that the exception only applies to those children who are alleged to be victims of sexual offenses,

whereas by statute it is clearly applicable to a whole host of other offenses.

WHEREFORE, for the foregoing reasons, appellant respectfully requests that this Court grant a rehearing from its opinion as rendered in this case.

Respectfully submitted,

Janet M. Thompson, MOBar #32260
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(314) 442-1101

CERTIFICATE OF SERVICE

I, Janet M. Thompson, hereby certify that on this 24th day of January, 1991, a true and correct copy of the foregoing was ~~mailed postage prepaid~~ hand delivered to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

Janet M. Thompson

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(314) 751-4144

February 7, 1991

Ms. Janet M. Thompson
Public Defender
3402 Buttonwood
Columbia, Missouri 65201-3724

In re: State of Missouri vs. Ralph Cecil Feltrop
Supreme Court No. 70896

Dear Ms. Thompson:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Opinion modified on Court's own motion. Execution set for May 15, 1991."

Very truly yours,

THOMAS F. SIMON

Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

cc: Attorney General

No. 70896

Circuit Court No. CR187-219-FX-J2

In the Supreme Court of Missouri

January Term, 19 91

State of Missouri, Respondent,

vs. Appeal from the Circuit Court of Jefferson County

Ralph Cecil Feltrop, Appellant.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jefferson County *rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the Court that the sentence pronounced against the said* RALPH CECIL FELTROP *appellant herein, by the said* Circuit Court of Jefferson County *be in all things executed on* Wednesday *the* 15th *day of* May, 19 91.

(Opinion filed.)

STATE OF MISSOURI—Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January *Session thereof, 19* 91, *and on the* 9th *day of* January *19* 91, *in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson, this 9th *day of* January *1991.*

Thomas F. Simon *Clerk*

Mary Elizabeth McHaney *D.C.*

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565.020. First degree murder, pen .— 1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

Execution, location, duties of the warden, RSMo 546.738

565.030. Trial procedure, first degree murder.—1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence of any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032 may be presented subject to the rules of evidence at criminal trials. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find beyond a reasonable doubt that any one or more of the aggravating circumstances listed in subsection 2 of section 565.032, if found, together with any other authorized aggravating circumstances found, warrant imposing the death sentence; or

(3) If the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.032. Evidence to be considered in assessing punishment in first degree murder cases for which death penalty authorized.—1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which are requested by the state and supported by the evidence;

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which are requested by the defendant and supported by the evidence;

(3) Any mitigating or aggravating circumstances otherwise authorized by law and supported by the evidence and requested by a party including any aspect of the defendant's character, the record of any prior criminal convictions, and pleas and findings of guilty and admissions of guilt of any crime or pleas of nolo contendere of the defendant;

(4) All evidence received during the first stage of the trial.

2. Statutory aggravating circumstances for a murder in the first degree offense shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;

(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;

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(3) The offender by his act of murder ie first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;

(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;

(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;

(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another;

(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or in the attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;

(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;

(13) The murdered individual was an employee of an institution or facility of the department of corrections and human resources of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;

(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder in the first degree was committed while the defendant was under the influence of extreme me or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

(L. 1983 S.B. 276, A.L. 1984 S.B. 448 § A)
Effective 10-1-84

565.040. Death penalty, if held unconstitutional, resentencing procedure.—1. In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036*.

2. In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

(L. 1983 S.B. 276)
Effective 10-1-84 (L. 1984 S.B. 448 § A)

* Probably should be 565.035, since there is no § 565.036 and § 565.035 is germane.

RULE 29.05 MISDEMEANORS OR FELONIES—PUNISHMENT REDUCTION BY COURT

The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive.
(Adopted June 13, 1979, effective Jan. 1, 1980.)

Committee Note—1979

This is substantially the same as prior Rule 27.04.

§ 13–703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13–1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

ORIGINAL

90-7928

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

RALPH CECIL FELTROP,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Petitioner, Ralph Cecil Feltrop, was convicted of murder in the first degree, §565.020, RSMo 1986, for which he was sentenced to death. Petitioner filed a direct appeal. Petitioner then filed a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in the opinion of the Missouri Supreme Court affirming petitioner's conviction, sentence, and the denial of post-conviction relief. **State v. Feltrop**, 803 S.W.2d 1 (Mo. banc 1991). Respondent does not dispute that petitioner's contentions were raised before the Missouri Supreme Court.

ARGUMENT

Use of Judicially-Narrowed Aggravating Circumstance

Petitioner seeks review of the Missouri Supreme Court's finding that the "depravity of mind" aggravating circumstance, which was found in this case, furnished sufficient guidance to the final sentencer (Petition at 6). He alleges that the jury, not the trial judge, is the final sentencer under Missouri law, and that the jury was not given the narrowed construction of the aggravating circumstance which has been adopted by Missouri courts (Petition at 6).

The aggravating circumstance which was submitted to the jury was based on §565.032.2(7), RSMo 1986. **State v. Feltrop**, 803 S.W.2d 1, 14 (Mo. banc 1991). That statute states: "The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind." The jury found as an aggravating circumstance beyond a reasonable doubt: "The murder of Barbara Ann Roam involved depravity of mind and as a result thereof it was outrageously or wantonly vile, horrible or inhuman." **State v. Feltrop**, supra.

The Missouri Supreme Court recognized that the language "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman", without further definition, is too vague to provide adequate guidance to a sentencer. Id. However, unlike the court in **Maynard v. Cartwright**, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), the Missouri Supreme Court has adopted a narrowing construction of §565.032.2(7). The factors

to be considered in determining whether depravity of mind exists include:

> mental state of the defendant, infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.

State v. Preston, 673 S.W.2d 1, 11 (Mo. banc 1984), cert. denied, 469 U.S. 893, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984). In **State v. Griffin**, 756 S.W.2d 475, 490 (Mo. banc 1988), cert. denied, 109 S.Ct. 3175 (1989), the court further explained that the "'mental state of defendant' factor means that the defendant must have acted with callous disregard for the sanctity of life as, for instance, where the defendant plans a robbery with the intent to kill all witnesses and has no apparent moral compunctions about such a cause of action or where the victim was killed while helplessly bound, after being otherwise incapacitated, or after complying with all of defendant's demands without resistance."

It is true that this limiting definition was not given to the jury. However, under Missouri law, a jury is not the final sentencer. The trial judge is. **State v. Feltrop**, supra at 15.

In the case at bar, for instance, after the jury recommended a sentence of death, the petitioner asked the trial judge, pursuant to Missouri Supreme Court Rule 29.05, to reduce his sentence because the evidence allegedly failed to establish beyond a reasonable doubt that any aggravating circumstance

existed. Id. at 15-16. The trial judge, acting as the final sentencer, conducted a hearing on the motion and denied petitioner's request. Id. at 16.

The Missouri Supreme Court's finding that under Missouri law the trial judge is the final sentencer concerns an issue of state law. As this Court is well aware, the views of a state's highest court with respect to state law are binding on the federal courts. **Wainwright v. Goode**, 464 U.S. 78, 84, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983).

It is important that the trial judge, under Missouri law, was the final sentencer, because this means that the final sentencer was properly instructed regarding all aspects of the sentencing process in that "[t]rial judges are presumed to know the law and apply it in making their decisions." **Walton v. Arizona**, 110 S.Ct. 3047, 3057 (1990). As this Court stated in **Walton v. Arizona**, supra:

> If the Arizona Supreme Court has narrowed the definition of "especially heinous, cruel or depraved" aggravating circumstances, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor.

Thus, it is clear that the final sentencer in the case at bar had adequate guidance that it was presumed to know and apply the judicially narrowed definition of the depravity of mind circumstance which is contained in **Preston** and **Griffin**.

Further, as this Court also recognized in **Walton v. Arizona**, supra at 3057:

> even if a trial judge fails to apply the narrowing construction or applies an improper

> construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in **Clemmons v. Mississippi**, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined. . . .

In the case at bar, §565.035.3, RSMo 1986, required the Missouri Supreme Court to perform an independent review to determine whether the evidence supported the jury's or the judge's finding of any aggravating circumstances found. **State v. Feltrop**, supra at 16. The Missouri Supreme Court performed such a review, explicitly used the judicially-narrowed construction of the depravity of mind aggravating circumstance, and found that said circumstance was adequately supported by the evidence. Id. at 16-17. Thus, even if both the jury and the trial judge did not consider the judicially-narrowed definition of the aggravating circumstance no error of constitutional magnitude occurred, because the record shows that the Missouri Supreme Court did in fact apply the judicially-narrowed definition. Id. at 16-17.

CONCLUSION

In view of the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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90-7928

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that a true and correct copy of the Brief of Respondent in Opposition to Petition in the case of **Ralph Cecil Feltrop v. State of Missouri**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this 29th day of May, 1991, to:

Nancy A. McKerrow
Office of State Public Defender
3402 Buttonwood
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JOHN M. MORRIS III

SUPREME COURT OF THE UNITED STATES

RALPH CECIL FELTROP *v.* MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 90–7928. Decided June 28, 1991

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

In *Clemons* v. *Mississippi*, —— U. S. —— (1990), this Court held that, once a defendant is sentenced to death by an erroneously instructed jury, a reviewing court can resentence the defendant to death only if it *clearly and expressly* engages in either harmless-error analysis or reweighing of permissible aggravating and mitigating circumstances. See *id.*, at ——, ——. It is conceded that the petitioner in this case was sentenced to death by an erroneously instructed jury. Nonetheless, the Missouri Supreme Court concluded that the trial court's *summary* denial of petitioner's motion to set aside the jury sentence constituted a constitutionally adequate resentencing. Because *Clemons* does not permit us to infer from the trial court's silence that it engaged in the requisite reweighing or harmless-error analysis, I would grant the petition for certiorari.

I

Petitioner was convicted of capital murder. At the conclusion of the penalty phase of his trial, the jury determined that the murder "'involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.'" 803 S. W. 2d 1, 14 (Mo. en banc 1991). On the basis of this single aggravating factor, the jury sentenced petitioner to death. *Id.*, at 6. Petitioner thereafter filed a motion to reduce his sentence, arguing, *inter alia*, that the "depravity of mind" aggravating factor was unconstitutionally vague under this Court's precedents. The trial court de-

nied the motion, stating from the bench that it "'has listened attentively to [petitioner's argument] and has recalled the testimony and the evidence in this cause, and the Court will overrule the Motion for Reduction of Sentence.'" *Id.*, at 16.

The Missouri Supreme Court affirmed. The court acknowledged that the "depravity of mind" aggravating factor was unconstitutionally vague under this Court's decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). See 803 S. W. 2d, at 14. See generally *Shell* v. *Mississippi*, —— U. S. —— (1990) *(per curiam)*; *Clemons* v. *Mississippi*, —— U. S. —— (1990); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). It also acknowledged that the trial court had erred in not instructing the jury to apply the limiting construction fashioned by the the Missouri Supreme Court in order to save the "depravity of mind" factor from unconstitutionality. See 803 S. W. 2d, at 14, citing *State* v. *Preston*, 673 S. W. 2d 1, 11 (Mo. en banc), cert. denied, 469 U. S. 893 (1984).* Nonetheless, relying on *Walton* v. *Arizona*, —— U. S. —— (1990), the Missouri Supreme Court concluded that the trial court's summary denial of petitioner's postsentence motion sufficed to cure any error in the jury's sentencing verdict. In *Walton*, this Court held that, where the death sentence is imposed by a trial judge, the trial judge need not expressly state that he has relied upon a constitutionally necessary limiting construction, because "[t]rial judges are presumed to know the law and to apply it in making their decisions." *Id.*, at ——. The Missouri Supreme Court in this case reasoned that it could likewise "presum[e] that the trial judge knew and applied the

*Under the Missouri Supreme Court's narrowing construction of the "depravity of mind" aggravating circumstance, the sentencer is to consider the following factors: "mental state of the defendant; infliction of physical or psychological torture on the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of the defendant's conduct; mutiliation of the victim's body after death; absence of any substantive motive; absence of defendant's remorse; and the nature of the crime." *State* v. *Preston*, 673 S. W. 2d 1, 11 (Mo. en banc), cert. denied, 469 U. S. 893 (1984).

relevant factors ennunciated in *State* v. *Preston* when he evaluated and ruled on [petitioner's] motion for reduction of sentence." 803 S. W. 2d, at 16.

In my view, the Missouri Supreme Court's reliance on *Walton* was clearly misplaced. As used in *Walton*, the "presumption" that a trial court has followed the law stands only for the proposition that error cannot be inferred where a trial court, acting as the initial sentencer, fails expressly to articulate its reliance on a limiting construction of what would otherwise be an unconstitutional aggravating factor. However, this presumption is clearly rebutted when, as here, the trial court *erroneously* instructs a sentencing jury by omitting any reference to the necessary limiting construction. Under such circumstances, the question is no longer whether error can be *inferred* from what the trial court has *not* said; error is *manifest* in what the court *has* said to the jury. See *Shell* v. *Mississippi*, *supra*; *Walton* v. *Arizona*, *supra*, at ——; *Clemons* v. *Mississippi*, *supra*, at ——; *Maynard* v. *Cartwright*, *supra*, at 363–364; *Godfrey* v. *Georgia*, *supra*, at 427–429 (plurality opinion). Thus, the question at that stage is whether a reviewing court has taken the steps necessary to *correct* sentencing error. In holding that the trial court's summary denial of petitioner's postsentence motion sufficed to cure the trial court's erroneous jury instructions in this case, the Missouri Supreme Court established a "presumption" that a reviewing court perceives and corrects all errors when it resentences a defendant to death.

This presumption is completely at odds with this Court's decision in *Clemons* v. *Mississippi*, *supra*. As in this case, the trial court in *Clemons* erred by failing to instruct the jury on a necessary limiting construction of a facially vague aggravating factor. This Court held that under such circumstances a reviewing court may itself resentence the defendant to death either by engaging in harmless error analysis or by reweighing the properly defined aggravating and mitigating circumstances. See *id.*, at ——. Nonetheless, because

it was "unclear whether [the reviewing court] correctly employed either of these methods," this Court vacated the sentence and remanded. *Id.*, at ——; see *id.*, at ——. In particular, because the reviewing court's opinion was "virtually silent" on whether fresh consideration had been given to the mitigating evidence proffered by the defendant, this Court declined to infer that the reviewing court had correctly perceived the requirements of its resentencing function. *Id.*, at ——.

Under *Clemons*, there can be no question that the trial court's summary denial of petitioner's postsentence motion does *not* constitute a constitutionally adequate resentencing. Nothing in the trial court's brief remarks from the bench even remotely suggested that it had engaged in reweighing or harmless error analysis. The record in this case is not "virtually silent" on whether the reviewing court understood the nature of the original sentencing error; it is *completely* silent. Indeed, because the reviewing court in this case was the very court responsible for injecting the error into the sentencing process, there is every reason to believe that it was completely oblivious to the very necessity for resentencing. To apply a "presumption" that the trial court understood and applied the law under these circumstances is to turn a defendant's right to error-free resentencing into a meaningless fiction.

The Missouri courts have failed to rectify the clear constitutional defect that has infected petitioner's death sentence. I believe that this Court is likewise remiss in its responsibilities when it permits a life-threatening error of this nature to go uncorrected.

II

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would

grant the petition and vacate petitioner's death sentence even if I did not view the issue in this case as being independently worthy of this Court's plenary review.